152 US 634

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1268.~~ 766 744 170

S. B. BURCK, APPELLANT,

vs.

ABNER TAYLOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED SEPTEMBER 4, 1890.

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1 In the Supreme Court of the United States.

Transcript of the record in—

S. B. BURCK
vs.
ABNER TAYLOR.

Suit disposed of in United States circuit court in and for the western district of Texas, Austin branch, at February term, 1890.

Be it remembered that in the circuit court of the United States in and for the western district of Texas, at the Austin branch thereof, the following proceedings were had by said court:

Transcript from State Court.

Original Petition.

THE STATE OF TEXAS, *County of Travis.* } *ss:*

In District Court of Travis County, Texas.

To the honorable W. M. Key, judge of said court:

Your petitioner, S. B. Burck, a resident citizen of Galveston, Galveston county, State of Texas, complaining of Abner Taylor, who is a resident citizen of the county of Cook, State of Illinois, now temporarily in Travis county, Texas.

Plaintiff represents that heretofore, to wit, on the 18th day of January, 1882, Matthias Schnell, as party of the second part, made and entered into a contract with the State of Texas, acting by and through Joseph Lee and N. L. Norton, capitol commissioners of the State of Texas, with the approval of O. M. Roberts, Governor
2 of the State of Texas, party of the first part, wherein, for a valuable consideration, the said party of the second part did, among other things, covenant, agree, and bind himself that he, the said party of the second part, would, in the very best workmanlike manner, style, and method, construct, build, erect, complete, and deliver to the State of Texas or its proper officers the capitol building and appurtenances thereto, of the size and dimensions specified and set forth in plans, specifications, and detail drawings adopted by the said capitol building commissioners with the approval of the Governor and heads of the departments, which was then deposited with the comptroller of the State of Texas for safe keeping, and numbered consecutively from one to thirty-nine, each and all of which plans and specifications and detail drawings having been signed by both of the parties thereto and made a part of the said contract, in which contract was set forth fully all of the stipulations made between the parties as to time and manner of constructing said building, taken together with said specifications.

That in said contract the State of Texas, the party of the first part, in consideration that the covenants, agreements, and stipulations therein contained and set forth should be fully and fairly kept and performed in every particular by the said party of the said second part in the time and manner therein stipulated and to the entire satisfaction of the party of the first part, through its proper officers, the party of the first part agreed, covenanted, and bound itself to convey to the said party of the second part a complete and perfect title to three million acres of land situated in the State of Texas,
3 and in counties of Dallas, Hartley, Oldham, Deaf Smith, Palmer, Castro, Bailey, Lamb, and Hockley; which said lands were fully described in a description thereof printed under the direction of the commissioner of the general land office, and maps of the same were on file in the general land office—

It being expressly agreed and understood by and between the parties thereto that the titles to said lands would be made to the party of the second part by the commissioner of the land office on the certificate of the capitol building commissioners, to be countersigned and approved by the comptroller as the work progressed, and in installments, as were fully set out in said contract.

That afterwards, to wit, on the 31st day of January, 1882, the said Matthias Schnell made and entered into a contract, in writing, with Charles B. Farwell, John V. Farwell, Abner Taylor, and A. C. Babcock for the purpose of securing financial aid in carrying out the said Schnell's contract with the State of Texas, as aforesaid, in which contract with the said Charles B. Farwell, John V. Farwell, Abner Taylor, and A. C. Babcock it was agreed by and between the parties thereto that the said Schnell should assign, set over, and that he did thereby assign, set over, to the said Charles B. Farwell, and John V. Farwell, Abner Taylor, and A. C. Babcock an undivided three-fourths interest in said contract between the State of Texas and the said Matthias Schnell for the purpose that said Charles B. Farwell, John V. Farwell, Abner Taylor, and A. C. Babcock should share in any and all of the profits that might arise from the said contract upon the consideration of the said contract between the State of Texas and Matthias Schnell as their interest might appear, which was
4 agreed to be equal; and it was thereby agreed and understood by and between the said parties that the said Charles B. Farwell, John V. Farwell, Abner Taylor, and A. C. Babcock should furnish whatever money might be needed or necessary to the proper construction of the said state-house, or for the execution of the said contract, as the same might be required from time to time; and it was further understood by and between the said parties that the said Matthias Schnell should have the management and superintendence of the building and construction of the said state-house from its commencement to its completion, subject to the direction and control of the majority in interest in said contract, at a salary of five thousand (5,000) dollars per annum, payable monthly; and it was further agreed by and between the said parties that there was then due and owing the said Matthias Schnell by the other parties to the said contract the sum of thirteen thousand (13,000) dollars, which

amount, with six per cent. per annum, should be paid whenever the sum of fifty thousand (50,000) dollars should be realized by the sale of lands named in said contract with the State of Texas; and, further, that after the said thirteen thousand (13,000) dollars was paid, as provided for, that the said Charles B. Farwell, and John Farwell, Abner Taylor, and A. C. Babcock should have the remaining profits until all the money advanced, as above stipulated, should be paid, with six per centum interest thereon per annum from the time the said money was so advanced, and all the other profits were to be divided as the interests of the parties appeared under the contract or to the heirs or assigns; and it was further stipulated and agreed in said contract that the same should be binding and operative from the day of its approval by the Governor of Texas and the heads of the departments of the government of Texas.

5 That on the 11th day of February, 1882, the State of Texas consented in writing, signed by the Governor of Texas and the capitol building commissioners, with advice and consent of the heads of the departments of the government of Texas, to the foregoing contract of assignment between Matthias Schnell, of the one part, and Charles B. Farwell and John V. Farwell, Abner Taylor and A. C. Babcock aforesaid, whereby the said A. C. Babcock, Charles B. Farwell, Abner Taylor, and John V. Farwell acquired an undivided three-fourths interest in said contract between Matthias Schnell and the State of Texas, hereinbefore mentioned, the right to share any and all profits that there might arise from the same, an undivided one-quarter thereof still being owned and belonging to the said Matthias Schnell.

That afterwards, to wit, on the 31st day of January, 1882, the said Matthias Schnell, party of the first part, and J. M. Beardsley, James S. Drake, and A. A. Burck, parties of the second part, made and entered into an agreement in writing, wherein it was agreed and stipulated by and between the said Matthias Schnell, party of the first part, and said parties of the second part, that, for and in consideration that the said contract between the State of Texas and Matthias Schnell and said contract between Matthias Schnell and the said Abner Taylor, Charles B. Farwell, John V. Farwell, Amos C. Babcock and each of them were obtained by said Schnell by and through the assistance, services, time, labor, and expenditures of the said several parties of the second part by them severally rendered, performed, and paid for at the request of the said Schnell, that he, the said Schnell, should and did therein stipulate, for said consideration and the sum of one dollar to him in hand paid severally

6 by each of the parties of the second part, that he, the said Schnell, party of the first part, should assign, set over, transfer, and did by said contract assign, set over, and transfer, to each of the said parties, to wit, J. M. Beardsley, James S. Drake, and A. A. Burck, an undivided one-fourth part of an undivided one-fourth share and interest in the profits, if any to arise, then owned and held by him, the said Schnell, in and under the contract hereinbefore mentioned and referred to, excepting only the amounts allowed to be paid him, the said Schnell, party of the first part, for salary as

superintendent and for moneys expended by him as named in said contract, meaning to transfer and set over — the said named J. M. Beardsley, J. S. Drake, and A. A. Burck, each separately and severally, an undivided one-fourth part of all and whatever share — interest whatever, whether in moneys, lands, or profits, which he, the said Schnell, might be entitled to have or receive at any time under or by virtue of contract hereinbefore mentioned, excepting only the five thousand (5,000) dollars agreed to be paid him, the said Schnell, for his services as superintendent and thirteen thousand (13,000) dollars for moneys due and owing to him, the said Schnell, under the said contract hereinbefore mentioned; and it was furthermore agreed that this contract should be binding upon and enure to the executors and administrators, heirs and assigns, of the several parties hereto respectively, and that the same should be recognized by the parties mentioned in the contract hereinbefore referred to.

That said contract last mentioned was duly acknowledged and authenticated for registration and was recorded in the records of Travis county on the 16th day of February, 1882, whereby
7 the said A. A. Burck acquired and became entitled to receive one-fourth interest in the interest then owned and held by the said Matthias Schnell in the profits which might arise therein and accruing out of the compliance with the said contract with the State of Texas for the said capitol building and said contract between said Matthias Schnell and Chas. B. Farwell, John V. Farwell, Abner Taylor, and A. C. Babcock, made for the purpose of better carrying out the first-mentioned contract with the State of Texas.

That afterwards, to wit, on the 9th day of May, 1882, the said Matthias Schnell, for a valuable consideration, transferred, released, and conveyed to Chas. B. Farwell, John V. Farwell, Abner Taylor, and A. C. Babcock, composing the firm of Taylor, Babcock & Company, all the right and interest which he then had in and under the said contract with the State of Texas for the consideration of the new state-house, and all interest, rights, and claims which he might then or thereafter acquire by virtue of any contract made by him, the said Schnell, with the said Chas. B. Farwell, John V. Farwell, Abner Taylor, and A. C. Babcock regarding the construction of said state-house or the appurtenances thereof and all interest accruing to him, the said Schnell, from any contract regarding the building of said state-house for the State of Texas; which said contract and assignment was consented to in writing by the State of Texas, signed by the Governor of Texas and the capitol building commissioners, with the advice and consent of the heads of the departments of the State government of Texas.

That afterwards, to wit, on the 20th day of January, A. D. 1882, the said firm of Taylor, Babcock & Company transferred and
8 assigned to Abner Taylor, for a valuable consideration, the said contract to construct, build, erect, and complete and deliver to said State of Texas a capitol building, hereinbefore mentioned; which assignment was duly consented to in writing on the

part of the State of Texas, signed by the Governor of the State of Texas and capitol building commissioners, with the advice and consent of the heads of the departments.

That on the same day the said Abner Taylor became, by reason of the transfers aforesaid and by reason of his agreement, substituted as the contractor with the State of Texas to construct and build said new capitol building.

That afterwards, to wit, on the 14th day of April, 1883, the aforesaid A. A. Burck, for a valuable consideration to him paid by the plaintiff, S. B. Burck, did grant, bargain, sell, and convey and release to the plaintiff, S. B. Burck, his heirs or assigns, one undivided one-half interest in one-sixteenth interest in the profits growing out of the capitol contract which was awarded to the said Matthias Schnell by the State of Texas, said capitol commissioners, Joseph Lee and N. L. Norton, transferred to him, the said A. A. Burck, by said Schnell, together with all and singular the rights, members, appurtenances, hereditaments, and improvements to same belonging or in anywise incident or appertaining thereto, whereby the plaintiff, S. B. Burck, became entitled to have and receive an undivided one-thirty-second interest in the profits which might arise from the construction of State capitol building under said contract as foresaid.

That the said Taylor, Babcock & Company received said
9 assignment from Matthias Schnell of all his interest in said contract to complete said State capitol with full notice of the interest of said A. A. Burck, as hereinbefore alleged, an undivided one-half of which interest A. A. Burck subsequently transferred to plaintiff, S. B. Burck, as aforesaid, and that the said Abner Taylor had full notice of the interest of the said A. A. Burck at the time of the said transfer of Taylor, Babcock & Company to him, the said Abner Taylor, and with full notice that by the terms of the agreement and assignment executed by and between said Matthias Schnell, of the first part, and J. M. Beardsley, Jas. S. Drake, and A. A. Burck, of the second part, that the same should be binding on and inure to the executors, administrators, heirs, or assigns of the several parties to the said contract.

That the said Abner Taylor has fully carried out the said contract with the State of Texas to build said capitol building, and the same has been accepted by the proper authorities of the State of Texas as a compliance by Abner Taylor with said contract for the building of said capitol building; that titles from the State of Texas have been made in the form of patents to the said Abner Taylor for said three million acres of land, except for about (300,000) three hundred thousand acres thereof, which has been earned and to which the said Abner Taylor already acquired a good and sufficient equitable title.

That the said Abner Taylor has sold and disposed of said land for the consideration of three and seventy-five hundredths dollars per acre, thereby realizing thereon eleven million two hundred and fifty thousand dollars.

That the cost of building said capitol building was the sum
10 of three million seven hundred & forty-four thousand six

hundred and thirty dollars, whereby the profits accruing on said construction of said capitol building were and are seven million five hundred and five thousand three hundred and seventy dollars, whereby the plaintiff, S. B. Burck, is entitled to receive from said Abner Taylor as plaintiff's interest in the profits of said contract the sum of two hundred and thirty-one thousand and four hundred and seventeen dollars; that the said Abner Taylor has received the consideration for said land — by him as aforesaid, which consideration, after deducting the said cost of building, is the profits derived from the building of said capitol building, and that he has not paid the plaintiff his part of said profits under said contract as aforesaid or any part thereof, although the same has been demanded of him.

Premises considered, plaintiff prays for process pursuant to law, and that on final trial he may have judgment for his said sum of two hundred and thirty-one thousand four hundred and seventeen dollars, and lawful interest thereon, and all costs of suit.

F. G. MORRIS,
Att'y for Plaintiff.

Endorsed: 8837. S. B. Burck *vs.* Abner Taylor. Plaintiff's original petition. Filed Dec'r 8, 1888. Jas. P. Hart, cl'k.

Citation to Abner Taylor.

Citation. Filed Dec. 8th, 1888.

THE STATE OF TEXAS, }
County of Travis. }

The State of Texas to the sheriff or any constable of Travis county, Greeting:

You are hereby commanded to summon Abner Taylor, if
11 to be found in your county, to be and appear before the hon. district court of Travis county, at the next regular term thereof, to be held at the court-house of said county, in the city of Austin, on the first Monday in March, A. D. 1889, then and there to answer a petition filed in said court on the 8th day of December, A. D. 1888, in a certain suit, No. 8837, in which said suit S. B. Burck is plaintiff and Abner Taylor is defendant, the nature of the demand set out in said petition being for two hundred thirty-one thousand four hundred and seventeen dollars alleged to be owing and due plaintiff by defendant as the plaintiff's part of the profits realized on the contract between the State of Texas and Matthias Schnell for building a State capitol building, claiming that one-thirty-second part of the profits of constructing said building under said contract passed to plaintiff by regular assignments, and that said contract to build the capitol was assumed by defendant through regular assignments for the purpose of having defendant construct and build said building, and that defendant became bound to pay plaintiff the one-

thirty-second part of the profits of the same as said Schnell was bound to do.

Herein fail not, but have you then and there before said court this writ, with your return thereon endorsed showing how you have executed the same.

Witness James P. Hart, clerk of the district court of Travis county, and the seal of said court attached, this the 8th day of December, A. D. 1888.

[SEAL.] JAMES P. HART,
Clerk D. C., T. C.

Endorsed: File No. 8837. S. B. Burck *vs.* Abner Taylor. Citation to Abner Taylor. Issued 8 day of Dec., 1888. Jas. P.
12 Hart, clerk. Came to hand on the 8th day of December, 1888, at 6 o'clock p. m. and executed on the 8th day of December, 1888, by delivering to the within-named defendant, Abner Taylor, in person, a true copy of this citation. R. E. White, sheriff of Travis county, by M. M. Johnson, deputy. Fees, 1.50; mileage, .25—total, 1.75.

Commission to Take the Deposition of Abner Taylor.

THE STATE OF TEXAS, }
County of Travis. }

To any notary public or the clerk of the district or county court or county judge of the county of Travis, Greeting:

Know ye that, reposing especial trust and confidence in your integrity and fidelity, we commission and require you to cause Abner Taylor, temporarily in Travis county, Texas, to come before you at such time and place as you may appoint, and that you then and there carefully and fully examine said witness under oath, first to be taken before you, touching the annexed direct and cross-interrogatories.

1. That you reduce his answers so taken to writing, in proper form, and cause the same to be subscribed and sworn to before you by said witness.

2. That you certify under your hand and seal of office that said answers were sworn to and subscribed before you by said witness.

3. That you seal up in an envelope the answers so taken,
13 together with the annexed interrogatories and this commission, with your name written across the seal thereof.

4. That you endorse on said envelope the names of the parties to said suit as well as the name of said witness.

5. That you direct the package to the "clerk of the district court of Travis county, at the city of Austin, Texas."

6. That if such package be transmitted by the public mail the postmaster shall endorse thereon that he received — from your hands and sign his name thereto.

Which answers, when so taken and returned as aforesaid, are to be read in evidence in a certain suit now pending in said district

court of Travis county, wherein S. B. Burck is plaintiff and Abner Taylor is defendant, No. 8837.

Herein fail not, but due return make of this commission, with your proceeding had by virtue thereof, to our said district court of Travis county, as above directed.

Witness James P. Hart, clerk of the district court of Travis county, and the seal of said court, at the office thereof, in the city of Austin, on this the 24 day of January, A. D. 1889.

JAMES P. HART,
[SEAL.] *Clerk D. C., T. C.*

Endorsed: File No. 8837. S. B. Burck *vs.* Abner Taylor. Commission to take deposition of Abner Taylor, Travis Co. Issued Jan. 24, 1889. Jas. P. Hart, clerk.

14 *Notary's Citation to Taylor.*

The State of Texas to the sheriff or any constable of Travis county, Greeting:

By virtue of authority vested in me by law as a notary public in and for Travis county, Texas, acting under a commission which I hold in my possession to take depositions of Abner Taylor, issued out of the district court of Travis county, Texas, by the clerk of said court, in certain cause therein pending, wherein S. B. Burck is plaintiff and the said Abner Taylor is defendant, styled S. B. Burck *vs.* Abner Taylor, and numbered 8837 on the docket of said court, you are hereby commanded to summon the said Abner Taylor to be and personally appear before me, at my office, in the city of Austin, Travis county, Texas, at No. 103 East Eighth street, at 3 o'clock p. m., on this the 25th day of January, A. D. 1889, then and there to testify by deposition in behalf of the plaintiff in said cause, by answering under oath the interrogatories in said cause by plaintiff propounded to said Abner Taylor, a certified copy of which interrogatories accompany said commission in my possession.

[SEAL.] Witness my hand and seal of office this January 25th, A. D. 1889.

A. T. PATRICK,
Notary Public, Travis County, Texas.

Came to hand same day issued, and executed, January 25th, 1889, at 11.5 o'clock a. m., by reading this subpœna in the presence and hearing of the within-named witness, Abner Taylor, and I also paid him a fee of $1.00.

R. E. WHITE,
Sh'ff Travis Co.
M. M. JOHNSON, *Deputy.*

Fee, 60 cts., paid by pl'ff.

15 Endorsed: No. 8837. S. B. Burck *vs.* Abner Taylor. Subpœna. Issued Jan 25, 1889, at 10.25 a. m. A. T. Patrick N. P., Travis Co., Texas.

Deposition of Abner Taylor.

S. B. BURCK
vs.
ABNER TAYLOR. } Suit in the District Court of Travis County.

Interrogatories to the defendant in said cause.

1st Int'y. Please examine the instrument certified by the clerk of the county court of Oldham county, Texas, to be a true copy of the record in this office of an instrument there recorded as a contract between Abner Taylor, Charles Benjamin Farwell, and John Villier Farwell, the Right Honorable John Campbell Hamilton Gordon, Earl of Aberdeen; Quinton Hogg, and Alderman Sir William McArthur, dated March 19th, 1886, which certified copy will accompany the commission to take your depositions in answer to this and the following interrogatories and will be handed you by the officer taking your deposition, and state if it is not true, to the best of your recollection, that you and the parties mentioned as parties to such contract did execute between you such a contract as said copy purports to be a copy of, and is it not true that said copy is a true and correct copy, as well as you remember, of the original contract of said date of March 19, 1886, executed by you as Abner Taylor and the other persons mentioned as parties to said contract.

16 S. B. BURCK
vs.
ABNER TAYLOR. } No. 8337. Suit Pending in the District Court of Travis County, Texas.

Answers and deposition of Abner Taylor to the accompanying direct and cross-interrogatories propounded to him in the above entitled and numbered cause, taken before A. T. Patrick, a notary public in and for Travis county, in accordance with the accompanying commission.

The said ABNER TAYLOR, having been by me first duly sworn to speak the truth, the whole truth, and nothing but the truth, in answer to the several direct interrogatories propounded to him, says:

To the 1st direct interrogatory the witness answers: We made a deed or conveyance as stated, and I have no reason to doubt but what the instrument referred to and which is handed me is the true copy of such instrument.

2nd Int'y. Have you in your possession or is there in the possession of any of your agents, employees, attorneys, or bailees the original contract, if any there was, of March 19, 1888, or at any other time, between yourself and the parties mentioned in said certified copy in relation to lands granted or contracted to be granted by the State of Texas for building a State capitol building; if yea, will you produce such original contract and attach the same as an exhibit to your answers hereto, having marked the same for identification? If

you have not in your possession or in the possession of your attorneys, agents, employees, or bailees, or any one of them, such an original contract, then state where the same is and to whom you delivered it, or in whose possession you left it, and for whom and under what instructions as to its custody or delivery to others,
17 and whether such instructions were observed and carried out.

Interrogatory second. I have not in my possession such instrument nor has any — my attorneys or employees, &c., the possession of such instrument. I delivered the instrument to the attorneys of the Capitol Freehold Land & Investment Company, Limited, for whom the Honorable John Campbell Hamilton Gordon, Quinton Hogg, and Sir William McArther *is* trustees. I presume that it is in the possession of the company, at their office, at London.

3rd. If any such contract as is described in said certified copy was ever executed by you and the persons mentioned therein as parties to the same, what consideration or considerations, if any, moved the parties to the execution of the same? Is the said consideration stated or expressed in any writing agreed to by said parties as expressing the consideration for said contract? If yea, when was such writing written and agreed to by said parties? In whose possession was said writing when you last saw it? Will you attach to your answer hereto such original, if in your possession or control, or a true copy thereof, if you have one, or state the substance of the same, as you remember it, if you have no such original or copy in your possession?

Interrogatory third. The land obtained from the State for building the state-house was all put into a company formed in England, the object being to facilitate borrowing money for building the state-house. This company has issued five million of debentures, which is a first mortgage upon this land. They have also issued ten millions of stock, which we own all but a few shares, and there-
18 fore own this five million of dollars, so that I cannot see that we have received any consideration yet. This conveyance was made to carry out this arrangement. I do not know of any writing wherein this consideration was expressed and agreed to by the parties, though there may be such an instrument. If there is it has escaped my memory.

4th. Is — not true that the consideration paid and agreed to be paid by persons mentioned in said certified copy of contract accompanying these questions as vendees of the lands therein specified *to* was the sum of three and $\frac{75}{100}$ dollars per acre for said land, and that you have received that sum per acre for all lands referred to in said contract which you have conveyed to said vendees? If not, what amount of money per acre have you received or have you contracted with said vendees or parties mentioned as vendees in said certified copy to receive for said land, and what amount of money have you received or contracted to receive for said land from said parties mentioned as vendees in said contract? If the consideration for such conveyance of said land as you have contracted to make to the parties mentioned in said copy of said contract was not money paid or

to be paid directly to you, then state what the consideration was and how it was to be paid, and whether the same has been paid or satisfied in whole or in part and what part and in what manner.

To the fourth. We have never received a dollar in money from the parties named in this instrument. The vendees of this deed are trustees and never contracted to give me anything, nor
19 did they ever agree to pay to me the sum of three dollars and seventy-five cents per acre nor did they ever pay that sum. I have never contracted to receive nor never did receive from the vendees in the instrument anything save and except the consideration expressed in the instrument. I have never received anything from the vendees, and I have stated in answer to interrogatory third what my object was in making this transfer.

5th Int'y. Have you executed to the persons *to* whom said copy of contract mentioned as vendees another instrument in writing, deed or deeds of conveyance, since the 19th day of March, 1886; if yea, how many instruments or deeds, about what dates, and what did you do with it or them? Where was it or were they when you last saw them? Is it or they of record anywhere; and, if yea, where? Have you the same or a copy thereof in your possession or under your control? If yea, attach the same or a copy thereof to your answer hereto; and, if you cannot do that, state the substance of the same and state why you cannot attach an original or copy.

To the fifth interrogatory. I have executed other instruments to those persons since that date; I do not remember how many; I do not remember the dates. I delivered them to the agents of the company. They are all recorded in Oldham and Crosby counties. The last that I saw of them was in the hands of the agents of the company in Chicago, to whom I delivered them. I have no copies in my possession or control. They are all something similar to the copy here presented to me. They all convey land, according to my recollection.

20 6th. Is it not true that you have conveyed by deed, duly executed and delivered to the parties appearing by said certified copy accompanying these questions to have contracted for said lands, all the lands to which you have acquired a legal or equitable title from the State of Texas for building the Texas State capitol building; if not, what part or amount of said lands have you not conveyed?

To the sixth interrogatory. They have not all been conveyed. I do not know the amount that is unconveyed; the deeds of record will show the amount that has been conveyed. These deeds are recorded in Oldham and Crosby counties.

7th. Please attach to your answers the certified copy of contract handed you by the officer taking your deposition which you testify concerning — and write your name on it, for identification, that it may be returned with your depositions.

F. G. MORRIS,
Attorney for Pl'ff.

To the 7th interrogatory. My name has been signed on the back of the certified copy, as requested.

ABNER TAYLOR.

THE STATE OF TEXAS, }
County of Travis. }

I, A. T. Patrick, a notary public in and for Travis county, Texas, do hereby certify that the foregoing answers of Abner Taylor, the witness before named, were made before me and were sworn to and subscribed before me by the said witness.

Given under my hand and seal of office this 25th day of January, A. D. 1889.

A. T. PATRICK,
[SEAL.] *Notary Public, Travis County, Texas.*

21 THE STATE OF TEXAS, }
County of Travis. }

I, Jas. P. Hart, clerk of the district court within and for said county and State, do hereby certify that the foregoing contains a true and correct copy of direct interrogatories propounded to witness and defendant in cause No. 8837, of S. B. Burck *versus* Abner Taylor, as same appears on file in this office.

Witness my hand and official seal, at office, in Austin, this 24th day of January, A. D. 1889.

[SEAL.] JAS. P. HART,
Clerk D. C., T. C., Texas.

EXHIBIT TO TAYLOR'S DEPOSITIONS.

This indenture, made and entered into this 19th day of March, one thousand eight hundred and eighty-six, by and between Abner Taylor, of Chicago, Illinois, in the United States of America, merchant, of the first part; Charles Benjamin Farwell and John Villiers Farwell, both of Chicago aforesaid, merchants, of the second part; the Right Honorable John Campbell Hamilton Gordon, Earl of Aberdeen; Quinton Hogg, of No. 5 Cavendish Square, in the county of Middlesex, in England, Esquire, and Alderman Sir William McArthur, of Holland Park, in the said county, K. C. M. G., of the third part.

Whereas the said party of the first part is constructing a building for the capitol of the State of Texas, United States of America, under a contract with the said State, and as the said contract is performed and when the same is fully completed on his part he will under the said contract have become the owner of and entitled to certain specified lands, in all of an area of three million
22 acres, situated in what is known as the Texas capitol reservation, in the State of Texas, all of which are hereinafter described, and the said lands are to be conveyed by the State of Texas to him in fee simple from time to time as they are earned under

the said contract, and he has already earned under said contract and has received by title in fee simple four hundred and thirty-eight thousand three hundred and seventy-two (438,372) acres of land, hereinafter particularly described, parcels of the said three million acres of land;

And whereas by an instrument executed on the part of the State of Texas by the members of the State capitol building board and State land board and the State capitol building commissioners, and duly attested under date of twenty-fifth day of July, one thousand eight hundred and eighty-five, the said Abner Taylor and his assigns were given the right to use all the said three million acres of land set apart for the building of a new State capitol, which were not then earned by the said Abner Taylor until the said building contract should be abandoned or fully complied with; and

Whereas the said Charles Benjamin Farwell and John Villiers Farwell, parties of the second part, are interested in the lands earned and to be earned under the said contract and in the leased interest in the lands mentioned in such last-named instrument:

Now, therefore, this indenture witnesseth: That the said Abner Taylor, party of the first part, for the consideration of one hundred dollars, lawful money of the United States of America, and for other good and valuable considerations moving to the parties
23 of the first and second parts hereto, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents does grant, bargain, sell, and convey, unto the said Charles Benjamin Farwell and John Villiers Farwell, parties hereto of the second part, do hereby confirm to the said Earl of Aberdeen, Quinton Hogg and Sir William McArthur, parties of the third part hereto, all and singular the lands and tenements situate in the county of Dallas, in the State of Texas, United States of America, known and described as surveys (in leagues and fractional leagues) numbered from one (1) to ninety-nine (99) inclusive, in the Texas capitol land reservation, containing four hundred and thirty-eight thousand three hundred and seventy-two (438,372) acres of land, more or less, which lands, with others, were appropriated and set apart by an act of the 16th Legislature of the State of Texas, chapter 13, entitled an Act to provide for designating, surveying, and sale of three million and fifty thousand acres of the unappropriated public domain for the erection of a new State capitol and other necessary public buildings at the seat of Government, and to provide a fund for surveying said lands, and which are more particularly described in a report made and signed by Nimrod Lindsey Norton (the commissioner appointed by the Governor of the said State of Texas, made under the authority of the said act to superintend the survey of the lands so appropriated), addressed to the board of control for the capitol reservation and dated Austin, Texas, November fifteenth, one thousand eight hundred and eighty—

The survey of the lands hereby conveyed being in said report numbered from one (1) to ninety-nine (99), inclusive, and maps
24 thereof being on file in the general land office of the State of Texas; to all of which for a more particular description of

said lands reference is hereby made, and which said lands were by the State of Texas patented to the said Abner Taylor on the twenty-first and twenty-second days of September, in the year of our Lord one thousand eight-hundred and eighty-five, by patents numbered respectively from thirteen (13) to one hundred and eleven (111), inclusive, upon said leagues numbered from one (1) to ninety-nine (99), inclusive, of the lands set apart for the construction of a State capitol of Texas and usually known as the capitol land reservation of the State of Texas, together with all and singular the tenements and hereditaments thereunto belonging or in anywise appertaining:

To have and to hold the four hundred and thirty-eight thousand three hundred and seventy-two (438,372) acres of land above particularly described and all the remainder and remainders and the rents, issues, and profits thereof to the said Earl of Aberdeen, Quinton Hogg, and Sir William McArthur as joint tenants and not as tenants in common, to their heirs, executors, and assigns in fee simple forever.

And the said Abner Taylor, party of the first part hereto, does further, for the consideration aforesaid, sell, assign, and set over, and the said Charles Benjamin Farwell and John Villiers Farwell, parties hereto of the second part, do hereby assign and confirm to the said Earl of Aberdeen, Quinton Hogg, and Sir William McArthur, parties of the third part hereto, all the leasehold, interest, and right of use which he, the said Abner Taylor, by the contract of lease dated on the twenty-fifth day of July, one thousand eight hundred and eight five, and executed by John Ireland, Governor; William J. Swain, comptroller; F. R. Lubbock, treasurer; W. C. Walsh, com'r gen'l land office; J. D. Templeton, attorney general, they being the State capitol building board and State land board, and Joseph Lee and M. H. McLaurin, State capitol building commissioners, and attested by John T. Dickinson, secretary capitol board and capitol building commissioners, and Randolph Lawrence, secretary State land board, in and to the said three million acres of land set apart for the building of a new State capitol not then earned by the said Abner Taylor, said lands being described as follows:

Surveys of leagues and parts of leagues numbered from one hundred (100) to seven hundred and thirty-nine (739), inclusive, except leagues 136, 137, 138, 147, 163, 175, 176, 177, 181, 182, 183, 184, 192, 193, 201, 270, 271, 272, 273, 338, 339, 340, 341, 342, 343, 350, 611, 612, 613, 614, 638, 639, 640, 641, 653, 654, 655, 656, 667, 668, 669, 670, 688, 689, 690, 691, 710, 711, 712, 713, 724, 725, 726, 727, 737, 738, and 1,292 acres out of 349, all of the lands set apart for the construction of the State capitol of Texas by an act of the 16th Legislature of the State of Texas, chapter 13, entitled An act to provide for designating, surveying, and sale of three million and fifty thousand acres of the unappropriated public domain for the erection of a new State capitol and other necessary public buildings at the seat of government and to provide a fund for surveying said lands, which reservation is usually known as the capitol land reservation of the

State of Texas, said lands being situated in the counties of Dallas, Hartley, Oldham, Deaf Smith, Palmer, Castro, Bailey, Lamb, and Hockley, in the State of Texas; to have and to hold the same
26 to the said Earl of Aberdeen, Quinton Hogg, and Sir William McArthur, parties of the third part hereto, as joint tenants and not as tenants in common, and to their heirs, executors, administrators, and assigns for and during the entire unexpired term and terms for which the said lands were as aforesaid granted to the said Abner Taylor and his assigns, to wit, until the said contract between the said Abner Taylor and the State of Texas concerning the building of the State capitol building shall be entirely completed or abandoned; and the said Abner Taylor, party of the first part hereto, and the said Charles Benjamin Farwell and John Villiers Farwell, parties of the second part hereto, for themselves, their heirs, executors, and administrators, do covenant and agree to and with the said Earl of Aberdeen, Quinton Hogg, and Sir William McArthur, and their heirs, executors, and administrators, and assigns, as follows, to wit:

First. That at the time of the making and ensealing of these presents the said party of the first part hereto is well seized of the four hundred and thirty-eight thousand three hundred and seventy-two (438,372) acres of land above described and known as surveys, in leagues and fractional leagues, numbered from 1 (1) to ninety-nine (99), inclusive, in the capitol reservation, in the county of Dallas, State of Texas, as of a good and indefeasible estate of inheritance in fee simple, free from all incumbrance, and has good right and lawful authority to sell and convey the same in manner and form as the said premises are hereby conveyed, and the same in the quiet and peaceable possession of the parties of the third part hereto against all persons whosoever lawfully claiming or to claim the same or any part thereof they, the said parties of the first and second parts hereto, will warrant and forever defend.

27 Second. That at the time of the making and ensealing of these presents the said Abner Taylor is under the instrument above mentioned, executed by the State capitol building board and State land board and the State capitol building commissioners, possessed of the lands constituting a part of the capitol land reservation of the State of Texas, known as surveys of leagues and parts of leagues numbered from one hundred (100) to seven hundred and thirty-nine (739), inclusive, except the fifty-six leagues and one thousand two hundred and ninety-two (1,292) acres of league 349, which, by the numbers thereof, are above expressly excepted from this grant, and that they, the said parties of the third part, shall have undisturbed possession of said lands until the same be fully earned under the contract between the said Abner Taylor and the State of Texas concerning the building of the State capitol for the State of Texas and until said lands shall have been conveyed to said Abner Taylor by said State of Texas in fee simple, under the said contract with the said State of Texas, and that they, the said parties of the first part and second parts hereto, will pay or cause to be paid and hold and keep the said parties of the third part hereto harmless

and all who shall hold or have any interest under this grant harmless from and free and clear of all rents and charges which may fall due by reason of or in accordance with the terms of the instrument by which said lands were demised to said Abner Taylor and his assigns.

Third. That the parties of the first part and second part hereto shall and will from time to time hereafter, upon the demand of the parties of the third part hereto, make, do, seal, execute, deliver,
28 and acknowledge or cause to be made, done, sealed, executed, delivered, and acknowledged, all and every such further acts, matters, things, deeds, conveyances, and assurances in law for the better assuring and conveying and confirming unto the said parties of the third part all and singular the hereditaments and premises, estates, leases, contracts, and property hereby conveyed and granted or intended so to be for the better effectuating and carrying out of the provisions, objects, and purposes of this deed and for the uses and purposes of this deed and subject to the powers and authorities herein mentioned, declared, given, and expressed.

Fourth. That the parties hereto of the first part and second part shall and will convey or cause to be conveyed by instrument similar to this instrument the fee simple of the residue of the said three millions of acres or upwards mentioned to the parties of the third part hereto or the surveyor or surveyors of them, their heirs, executors, administrators, or assigns, as rapidly as the said land shall be certified and title thereto acquired by the parties of the first and second parts hereto, or by any person or persons or corporation under the said contract with the State of Texas, and that all thereof or lands of equal value in place of any thereof which for any reason they may not be able to acquire shall be so acquired and conveyed before the first day of July, one thousand eight hundred and ninety, and that they will cause such conveyances to be duly registered in the proper recorder's office in the said State of Texas without expense to the parties hereto of the third part or any person claiming through them: Provided always that the covenanters shall be at liberty to exchange any of the lands constituting such residue for any other adjacent lands of equal value, and the lands so
29 taken in exchange shall, for the purposes of the foregoing covenant, be deemed to form part of such residue and shall be conveyed accordingly.

In witness whereof the said Abner Taylor, party hereto of the first part, and the said Charles Benjamin Farwell and John Villiers Farwell, parties hereto of the second part, have hereunto set their hands and seals the day and year first above written.

(Signed) ABNER TAYLOR. [SEAL.]
CHARLES BENJAMIN FARWELL. [SEAL.]
JOHN VILLIERS FARWELL. [SEAL.]

Signed, sealed, and delivered by the above-named.
(Signed) FRANK BURNAM.

NOTE.—In the first line of the first page the words "and entered

into" interlined. In the twelfth line of the first page the word "third" interlined in place of "said," erased. In the eleventh line of the second page the word "twenty" interlined. In sixth line of sixth page the word "said" being interlined in place of "and." In eleventh line of the ninth page "eighteen" stricken out and "first" interlined. In the attestation clause these words stricken out, "and the said Earl of Aberdeen, Quinton Hogg, and Sir William McArthur, parties hereto of the third part."

All done before signing.

(Signed) FRANK BURNAM.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Frank Burnam, a notary public in and for the said county, in the State aforesaid, do hereby certify that Abner Taylor, Charles Benjamin Farwell, and John Villiers Farwell, personally
30 known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the purpose and consideration therein set forth.

Given under my hand and notarial seal this 20th day of March, A. D. 1886.

(Signed) FRANK BURNAM,
[SEAL.] *Notary Public.*

Filed for record April 6th, 1886, at 6 o'clock p. m., and recorded April 19th, 1886, at 2 o'clock p. m.

(Signed) C. B. VIVIAN, *Co. Clerk.*

THE STATE OF TEXAS, }
Oldham County, }

I, D. F. Cole, clerk of the county court in and for said Co. and State, do hereby certify that the above and foregoing fourteen pages of writing contain a true and correct copy of the records of my office as the same appears on pages 122 to 132, inclusive, of the records of deeds of Dallas county, Texas, vol. 1.

In witness whereof I hereunto sign my name and affix the seal of said court, at office, in Tascosa, Tex., this 22 day of Dec'b'r, A. D. 1888.

D. F. COLE,
Cl'k Co. Court, Oldham County, Tex.,
P'r A. B. TOMB, *Deputy.*

Endorsed: Abner Taylor.

31 Endorsement on envelope containing Abner Taylor's depositions:

To the clerk of the district court of Travis county, Austin, Texas. A. T. Patrick, N. P., T. C., Tex., officer before whom the enclosed depositions were taken. A. T. Patrick, N. P., T. Co., Tex., officer

before whom the enclosed depositions were taken. Witness fee, 1.00; sheriff's fee, .60; notary's fees, 3.00; $4.50 fee for taking within depositions. Paid by plaintiff. File No. 8837. District court, Travis county, Texas, S. B. Burck *vs.* Abner Taylor. Depositions of Abner Taylor, witness. Received this package on the 26th day of January, A. D. 1889, from the hands of A. T. Patrick, notary public, the officer before whom they were taken, and filed same on the 26th day of January, A. D. 1889. Jas. P. Hart, clerk dis't court, Travis county. This package is opened on the 26th day of January, 1889, at the request of F. G. Morris, Esq., attorney for the plaintiff. Jas. P. Hart, clerk dis't court, Travis Co., Texas.

32 *Commission to Take the Depositions of S. B. Burck.*

THE STATE OF TEXAS, }
County of Travis. }

To any notary public or the clerk of the district or county court or county judge of the county of Galveston, Greeting:

Know ye that, reposing especial trust and confidence in your integrity and fidelity, we commission and require you to cause S. B. Burck to come before you at such time and place as you may appoint, and that you then and there carefully and fully examine said witness under oath, first to be taken before you, touching the annexed direct and cross-interrogatories:

1. That you reduce his answers, so taken, to writing in proper form and cause the same to be subscribed and sworn to before you by said witness.

2. That you certify under your hand and seal of office that said answers were sworn to and subscribed before you by said witness.

3. That you seal up in an envelope the answers to taken, together with the annexed interrogatories and this commission, with your name written across the seal thereof.

4. That you endorse on said envelope the names of the parties to said suit as well as the name of said witness.

5. That you direct the package to the clerk of the district court of Travis county, at the city of Austin, Texas.

33 6. That if such package be transmitted by the public mail the postmaster shall endorse thereon that he received — from your hands and sign his name thereto.

Which answers, when so taken and returned as aforesaid, are to be read in evidence in a certain suit now pending in said district court of Travis county, wherein S. B. Burck is plaintiff, and Abner Taylor is defendant, No. 8837.

Herein fail not, but due return make of this commission, with your proceedings had by virtue thereof, to our said district court of Travis county, as above directed.

Witness Jas. P. Hart, clerk of the district court of Travis county, and the seal of said court, at the office thereof, in the city of Austin, on this the 15th day February, A. D. 1890.

JAS. P. HART,
Clerk D. C., T. C.

Endorsed: File No. 8837. S. B. Burck *vs.* Abner Taylor. Commission to take depositions of S. B. Burck, Galveston county. Issued Feb'y 15, 1889. Jas. P. Hart, clerk.

Depositions of S. B. Burck.

S. B. BURCK
vs.
ABNER TAYLOR. } No. 8837.

Suit pending in the district court of Travis county, Texas.

To the clerk of the district court of Travis county, Texas:

We hereby apply for a commission to take the depositions of S. B. Burck, plaintiff in the above-entitled suit, who resides in the county of Galveston, in the State of Texas, in answer to the following interrogatories propounded on behalf of the defendant, Abner Taylor, under chap. 3, art. 2238, of the Revised Statutes of
34 the State of Texas.

WALTON, HILL & WALTON, AND MATLOCK.

Int. 1. State your name, age, and place of residence.

S. B. BURCK
vs.
ABNER TAYLOR. } No. 8837.

Suit pending in district court, Travis Co., Texas.

The answers of S. B. Burck to the attached interrogatories propounded to him by defendant in said numbered and entitled cause, in accordance with the commission hereto attached.

Said witness answered to—

Int. 1. My name is S. B. Burck; my age is 52 years, and place of residence is Galveston, Texas.

2. Are you plaintiff in this cause?

Int. 2. I am.

3. You have filed a suit against Abner Taylor in the district court of Travis Co., Tex., claiming some kind of an interest in the contract for the construction of the new State capitol. Will you state fully what you base your interest in said contract on? From whom did you acquire your claim or interest in the contract?

Int. 3. I base my claim on my purchase from A. A. Burck of one-half of his interest in the contract for building the State capitol. From A. A. Burck.

4. If you should state that you acquired your claim through one A. A. Burck, state whether or not there was any writing entered into between you and A. A. Burck; if so, state the nature of such writing, when and where it was executed and who was present when it was executed. Where is the original of said instrument,

when did you first see and where and in whose possession
35 was it when you first saw it? If you have the original, attach it to your answer and write your name accoss it for identification.

Int. 4. There was. He gave me a regular deed for my interest, which was recorded in Austin; it was a deed executed in Austin—at least it was sent to me by him from Austin. I cannot say without seeing the papers who was or were present. Mr. G. A. Meyer, my agent here, has the papers. Mr. G. A. Meyer has the original of my deed; it came to me by mail from my brother; it was delivered by ths post-office delivery clerk, so far as I remember; it has been several years since I got the paper. I don't remember the exact circumstances of receiving it. I havn't it; Mr. G. A. Meyer has it, as before stated. I have turned over all the papers to him.

5. Is it not true that you never saw the original of the transfer from A. A. Burck to you? If you say you did see it, state then when you saw it first (give the date), where was it, and in whose possession was it.

Int. 5. It is not true. I have had it in my possession quite a number of years. I first saw it very soon—not later than one month—after the date of its record in Austin; it was in my hands in Galveston, Texas, and never been out of my hands since, until I delivered it to my agent in Galveston for the purpose of looking after my interests.

6. If you state that you did see it, is it not true that it was then in the possession of A. A. Burck, and is it not true that it was in the handwriting of A. A. Burck?

Int. 6. It was not in the possession of A. A. Burck. I cannot say in whose handwriting it was without seeing the document.

7. Is it not true that you never did have the original of said
36 transfer in your possession until long after it had been written and recorded, and is it not true that at the time said transfer of A. A. Burck was made to you that you knew nothing of the transaction?

Int. 7. It is not true. It is not true.

8. What consideration did you pay for the interest you claim in the contract? Is it not true that you did not pay any consideration? If you state that you did pay him, please state how much money you paid him for it. Did you get the money from the bank; and, if so, what bank? Did you borrow money to pay him or any part of it; and, if so, when did you borrow it, and from whom did you borrow it, and have you paid it back or do you still owe it?

Int. 8. I paid one thousand dollars in cash and other valuable considerations. It is not. One thousand dollars in cash and other considerations. I got the money from Ball, Hutchings & Co.'s bank, my place of deposit. I did not borrow it, and consequently did not have to pay it back.

9. What was your business at the time you claim to have bought this interest from A. A. Burck, where were you and how living, and what business were you doing? At the time you claim to have bought an interest in the contract from A. A. Burck, is it not true

that you were in debt and owed large sums of money; is it not true that at that time you were not able to pay anything for anything that required money? If you say you were, give a schedule of your then property, credits, and assets.

Int. 9. My business was that of State cotton-weigher. I was in the city of Galveston, Texas. I was keeping house. I was following my occupation as State weigher. It is not true that I was
37 in debt, and I did not owe any money. It is not true that at the time I was not able to pay anything that required money. I owned my own house; also property adjoining my house, which I afterwards sold to G. A. Meyer; also cash on deposit with Ball, Hutchings & Co. I owned some stocks and was in debt to no one, only for monthly bills, such as grocery, butcher, &c., for family supplies; also other property in Galveston, located on Ave. I & 33rd Sts., all of which property was free from any incumbrances.

10. What were you worth above your liabilities when or at the time you claim to have made the purchase from A. A. Burck? Is it not true that A. A. Burck made this transfer to you without your knowledge? Is it not true that you never heard of the transaction until he presented or sent you a power of attorney to sign authorizing him to dispose of your interest in the same?

Int. 10. I was worth above my liabilities some 15 or 20 thousand dollars. It is not true that A. A. Burck made the transfer without my knowledge. It is not true that I never heard of the transaction until A. A. Burck sent me a power of attorney to sign authorizing him to dispose of my interest in the same. The power of attorney named was given for a specified object or purpose, which was to make a sale in New York, where he had an offer for the interest of both, the offer amounting to (100,000) one hundred thousand dollars. The purchasing party failed to comply with their part of the contract and the sale was not made. A. A. Burck himself went to New York to make this sale and on his return the authority given in the power of attorney ceased.

11. Is it not true that you did sign a power of attorney
38 authorizing A. A. Burck to sell your interest in the contract, and was not this the first time you ever knew you had an interest in it? If this be not true, then where is the original power of attorney that you gave A. A. Burck authorizing him to sell your interest in the contract? Before whom did you acknowledge that power of attorney and who wrote it? If you have the original attach it to your answers and write your name across it for identification.

Int. 11. It is true that I signed such power of attorney for a specified purpose, as before stated, to make a sale in New York. It is not true that this was the first time I ever knew that I had an interest in the contract. The original power of attorney has been lost or torn up. I acknowledged the power of attorney before William R. Johnson, a notary public, in Galveston. To the best of recollection, Wm. R. Johnson wrote it. I haven't the original.

12. When you executed the power of attorney to A. A. Burck to sell the interest he had transferred to you, what price did you put

upon the interest? Is it not true that at that time that you did not own any interest in the contract, and that you had not paid one cent consideration for the same, and is it not a fact that you simply made the power of attorney to A. A. Burck at his request and in order to enable him to sell the interest he had transferred to you without consideration?

Int. 12. I gave him positive instructions not to sell the joint interest for less than fifty thousand dollars. Our interests were equal. It is not true that I did not own any interest in the contract at that time, nor that I had not paid one cent consideration for the same, and it is not true that I had simply made the power of attorney to A. A. Burck at his request and in order to enable him to sell
39 the interest he had transferred to me without consideration, for the reason that I had no interest for which I had not given a consideration.

13. Is it not true that you never revoked the power of attorney you gave to A. A. Burck? If so, state the date you revoked the power of attorney and the reason you did so. Is it not a fact A. A. Burck wrote the revocation of that power of attorney and sent it to you to sign? Is it not true that the revocation is in A. A. Burck's handwriting.

Int. 13. I did revoke the power of attorney. Not having the original here, can't give the date of the revocation. It may be had by referring to the records in Austin. My reasons for revoking the power, or at least one, was at the time A. A. Burck was out of the State and, he not having returned it to me, I deemed it proper on my part to revoke the power by filing a revocation for record. It is not a fact that A. A. Burck wrote the revocation of the power and sent it to me to sign. It was done without his knowledge. It is not true that the revocation is in A. A. Burck's handwriting.

14. Where does A. A. Burck now reside? When did he leave the State of Texas? How long has it been since A. A. Burck was a citizen of the State of Texas?

Int. 14. I do not know where A. A. Burck now resides. I don't know when he left the State of Texas. I don't know how long since he was a citizen of Texas. I don't know that he has lost his citizenship.

15. Did A. A. Burck ever receive any advances from you; if so, when and what amount? Is it not true that if any such transfer as you have been questioned about was made with your knowledge, consent, or at your request that the same was made as a security merely to secure you in the sum advanced by you to A. A. Burck?
40 Int. 15. He had received advances from me at various times, from his childhood to the present time, amounting to many thousand dollars. It was not made as a security, but it was a distinct and separate transaction, for which I paid a then present consideration.

16. Is it not true that for the last five years you have been in no lucrative business? If this be true, then explain in what business you were engaged in the years 1882, 1883, and 1884, with whom,

what doing, on what salary. Specify each business or person with whom you were engaged, what investments did you make, what in properties and at what prices.

Int. 16. It is not true that for the last five years I have been in no lucrative business. My occupation in the years 1882, '83, and '84 was that of a State cotton-weigher. There is no specifiod salary connected with the office, but a fee allowed for each package weighed. In the year 1884 I was associated with C. A. Horsley in the hardware business and am still so associated. I had no other business during those years except that of State cotton-weigher and hardware merchant, as aforesaid. I bought no property at all during those years that I can remember. The original investment in the firm of Horsley & Burck on my part was cash three thousand dollars.

17. Is it not true that this pretended transfer from A. A. Burck to you was manœuvred by A. A. Burck for his own purposes and in which you had no real interest? If this is not true, explain the whole transaction from the opening of negotiations between you and A. A. Burck with its final consummation and what was the consummation.

41 Int. 17. It is not true that the transfer was manœuvred by A. A. Burck, and that I had no interest in it. Knowing A. A. Burck to be one of the four original contractors who, after receiving the contract from the State, arranged with a moneyed syndicate to fulfill the terms of the contract for a consideration of three-fourths interest in the contract, leaving one-fourth to be divided equally among the original four, makng A. A. Burck's interest one-sixteenth, and A. A. Burck, being in need of money, requested me to make a sale of one-half his interest. I was unable to make the sale to other parties and therefore offered to make the purchase myself, for which I paid the before-stated considerations.

18. Is it not true that on the 18th day of August, 1885, there was pending between you and A. A. Burck negotiations for the purchase by you of your now-claimed interest in the capitol contract? And were you not pushing him to final and decisive action in that matter? If not, what negotiations were pending between you at that day or for twenty days prior to that day?

Int. 18. There were no such negotiations pending, because I had previously purchased the interest I now claim. I was not pushing him to final and decisive action in that matter. I do not remember any negotiations that were pending between us on that day or for twenty days prior to that day.

19. Is it not true that you were perfectly ignorant of the terms and conditions of the capitol contract on the 14th day of April 1883? If not, how, when, and where, and in what particular manner did you become acquainted with the terms, conditions, and stipulations of said contract?

Int. 19. I believed myself to be aware of all its terms
42 and conditions. I derived my information from A. A. Burck and newspaper reports.

20. Is it not true that you never saw the transfer from Matthias

Schnell to Beardsley *et al.* in which A. A. Burck is named? If this be not true, then say when and where, in whose hands, and under what circumstances you did see it.

Int. 20. I never saw the written transfer from Matthias Schnell to Beardsley *et al.* in which A. A. Burck is named, but saw a certified copy of same. I never saw it.

21. Is it not true that you were not in the city of Austin on the 14th day of April, 1883? If you were there on that day, on what business were you there? With whom did you transact any business and who was present? Is it not true that you have not been in Austin in many years? If this be not true, when were you in Austin and on what business?

Int. 21. I was not in Austin on April 14th, 1883. I do not remember having been in Austin since the last term of Ireland's administration. My business when last in Austin was with the Governor.

22. Is it not true that you never had in your possession the transfer from A. A. Burck to you on which you base this suit in part? If this be not true, then what did you do with said transfer, to whom did you deliver it, and when did you last see or hear of it? In whose possession was it? What was he doing or proposing to do with it and why was he thus proposing to use it, at whose instance and for whose benefit?

Int. 22. I have always had the transfer since I have owned
43 it up to the time I transferred it to my agents to bring this suit. I have had it in my possession all the time in my office until I delivered it to Mr. G. A. Meyer, my agent, and I do not remember the date of its delivery to said Meyer. Mr. Meyer informs me that it is in the possession of his correspondent in Austin. It was in Mr. Meyer's hands when I saw it last. He was proposing to bring suit for recovery under it. He was proposing to use it for recovery under it, at my instance and at my request and for my benefit.

23. Is it not true that A. A. Burck, on the 27th day of May, 1884, sold to Abner Taylor and A. C. Babcock all the interest that he had in the capitol contract? If not, state what you know about said transaction. Who advised you of it, when, and for what purpose? Is it not true that you never caused the contract between you and A. A. Burck about the capitol contract to be recorded and did not pay for the recording? If this be not true, then when was it recorded, where was it recorded, and through whom did you cause it to be recorded?

Int. 23. I do not know whether he sold all his interest in the capitol contract or not to the parties named. I do not know now whether he ever sold his interest or not, only from hearsay. I do not know anything about the transaction. I don't remember who told me about the sale of A. A. Burck's interest. I requested A. A. Burck to have my purchase from him to be recorded before he sent it to me. I don't remember whether I paid him for the recording of the deed from him to me or not. It was filed to be recorded, according to a copy before me, on April 20th, 1883, at 5 p. m., in

Austin, Travis county, Texas. I requested A. A. Burck to
44 have it recorded.

24. Is it not true that you do not now and did not, at the institution of this suit, own the whole of the pretended claim upon which this suit is based? It is not true that you long ago or recently, or at some time, made transfers of parts, portions, or the whole of said claim? If this be so, give the names of each and every person interested with you, either directly or indirectly, for much or little, and on what terms or conditions said parties acquired their interests and on what they are based.

Int. 24. I do now and did previous to the institution of the suit own all the claim upon which the suit is based. I have arranged with my agent, Mr. G. A. Meyer, to pay him a *pro rata* of the amount recovered in this suit. I have made no other transfer to any one except to give G. A. Meyer my power of attorney to act in my behalf, and his interest is based upon the contingency of a recovery in the suit by me.

25. Is it not true that this suit is, on your part, a venture or speculation on your part on the result of which adversely to you, should such be the case, that you are not to be held liable for any costs, attorneys' fees, expenses, execute no bond, give no securities, but should stand harmless, whatever the result may be?

Int. 25. I did not go into this suit as a venture or speculation. I believed it to be my right. It is my agreement with Mr. G. A. Meyer that in the event the suit goes adversely to me that I am not to be held liable for any costs, attorneys fees, expenses, nor to execute any bonds nor give any securities, and that I am to stand harmless. I am to give any bonds required, but am to be protected from any loss on my bonds.

45 26. Is it not true that within two weeks preceding the 8th day of December, 1888, you received a letter from A. A. Burck in which he in substance directed you to move in this matter—that is to say, to press in the courts or otherwise this alleged contract on which this suit is brought? If this be not true, then attach the last letter you received from A. A. Burck, preceding the 8th day of January, 1888, to your answer hereto, writing your nome across the face thereof in order to identify it.

Int. 26. I did not receive any such letter—I have no such letter. My correspondence with A. A. Burck for some time past have been very limited and had but little reference to the subject in hand, and the letters being of but little importance I have not been keeping them. I could not now say that I have any letter bearing upon this subject from him and could not know without going over my papers in my office.

27. Is it not true that A. A. Burck inclosed this transfer on which this suit is based from him to you in a letter from him to you, in which he stated in substance that he wished that you would keep the transfer for him; that probably he could make something out of it after awhile, or words to that effect? If that be not true, attach the letter which he wrote to you when he enclosed the transfer to you.

Int. 27. There was no such statement made and no such request in the letter inclosing the transfer to me. I do not kwow whether any letter came with the transfer; if so, I have not got it in my possession.

28. Is it not true that the first time you ever heard of the
46 transfer from A. A. Burck to you it was through a letter from said A. A. Burck to you, in which he said in substance that he had made a transfer to you of a half of all his interest in the capitol contract, and in that last letter was there not a form of a power of attorney from you to A. A. Burck, authorizing him to sell the interest in said contract that he had so transferred to you, or words to that effect? If that be not true, then attach hereto the letter which you did receive from said A. A. Burck on that subject to your answer and write your name across it for the purpose of identification.

Int. 28. I do not remember ever having had any such letter from A. A. Burck. I do not see how it is possible that there could have been such a letter. Never having received such a letter, I cannot attach it.

29. Is it not true that you have destroyed all the letters that you have received from A. A. Burck since the 14th day of April, 1883, up to the 8th day of December, 1888, which related to, referred to, or were connected with, directly or indirectly, nearly or remotely, either with the transfer from A. A. Burck to you on which this suit is based, or the power of attorney which you gave to A. A. Burck to transfer your interest so transferred to you by him, and the revocation of the power of attorney just mentioned, or in relation to the institution of this suit, or in relation to approaching the defendant in this suit about any settlement, and is it not true that you so destroyed said letters at the instance and by the direction of the said A. A. Burck? If all these be not true, then attach to your answers hereto every letter received by you from A. A. Burck from the 1st day of March, 1883, up to the hour you answer these questions and write your name across the face of each one for the purpose of identifying them.

47 WALTON, HILL & WALTON & MATLOCK,
Att'ys for Defendant, Abner Taylor.

Int. 29. It is not true that I ever destroyed any letters at his instance. I do not remember ever having destroyed any letters or papers that had reference to this subject. I have searched the papers in my office and cannot find a letter in relation to this matter or any other from A. A. Burck. I have never destroyed any letters or papers that had reference to this matter at the instance or request of A. A. Burck.

S. B. BURCK.

I hereby certify that the foregoing answers to the interrogatories hereto attached and propounded to said witness in said cause were sworn to and subscribed before me by the said witness.

In testimony whereof witness my hand and official seal this 16th day of February, A. D. 1889.

W. B. LOCKHART,
[SEAL.] *Notary Public, Galveston County, Texas.*

Notary's fees, $15; paid this 16th day of February, A. D. 1889, by the defendant.

WM. B. LOCKHART.

THE STATE OF TEXAS, }
County of Travis. }

I, Jas. P. Hart, clerk of the district court in and for said county and State, hereby certify that the above and foregoing is a true copy of direct interrogatories propounded to S. B. Burck on behalf of the defendant in cause No. 8837—S. B. Burck *vs.* Abner Taylor—as now on file in my office.

Given under my hand and seal of office, at Austin, this 15th day of February, A. D. 1889.

JAS. P. HART,
Clerk Dist. C't, Travis Co. [SEAL].

48 Endorsed on envelope containing S. B. Burck's depositions: Clerk district court Travis county, Austin, Texas. 8837. S. B. Burck, plaintiff, *vs.* Abner Taylor, defendant. Depositions of S. B. Burck. Wm. B. Lockhart, notary public, Galveston Co., Texas. Received this package from the hands of Wm. B. Lockhart, the officer before whom the within deposition was taken, this the — day of February, 1889. T. A. Gary, P. M., by Chas. G. Clifford, A. P. M. Received this package from the post office at Austin, Texas, this 18th day of February, 1889, and filed same Feb'y 18, 1889. Jas. P. Hart, cl'k. Opened by request of Walton, Hill, & Walton Feb'y 18, 1889. Jas. P. Hart, cl'k.

Petition and Bond for Removal. Filed March 5th, 1889.

In the District Court, Travis Co., Texas.

S. B. BURCK }
vs. } 8837.
ABNER TAYLOR. }

UNITED STATES OF AMERICA, }
Western District of Texas. }

To the honorable the district judge of the district court of Travis county:

The petition of Abner Taylor represents: 1. That your petitioner at the time of the commencement of this suit was and still is a citizen of the State of Illinois, and that the plaintiff, S. B. Burck, was and still is a citizen of the State of Texas; that the matter in dispute in this cause exceeds, exclusive of interest and costs, the sum

of $2,000, all of which appears upon the face of plaintiff's petition therein.

Your petitioner makes and files herewith a bond, with good and sufficient sureties, for his entering into the circuit court of the
49 United States for the western district, at the Austin branch thereof, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

2. Your petitioner therefore prays this honorable court to accept this petition and said bond and proceed no further herein except to make the necessary orders for the transfer of this suit to the said circuit court of the United States; and so your petitioner shall ever pray.

A. L. MATLOCK AND
WALTON, HILL & WALTON,
Attorneys for Petitioner.

UNITED STATES OF AMERICA, }
Western District of Texas. }

Know all men by these presents that Abner Taylor, as principal, and Jno. W. Maddox and C. E. Anderson, as sureties, are held and firmly bound unto S. B. Burck in the penal sum of $500; for the payment whereof, well and truly to be made unto the said S. B. Burck, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, conditioned, however, that the said Abner Taylor, having petitioned the district court of Travis county, State of Texas, for the removal of a certain cause therein pending, wherein the said S. B. Burck is plaintiff and the said Abner Taylor is defendant, to the circuit court of the United States in and for the western district of Texas, at the Austin branch thereof:

50 Now, if the said Abner Taylor shall enter into said circuit of the United States on the first day of its next session, at Austin, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit is wrongfully or improperly removed thereto, then shall this obligation be void otherwise to remain of full force and effect.

Witness our hands the 5th day of M'ch, A. D. 1889.

ABNER TAYLOR.
A. L. MATLOCK,
And by WALTON, HILL & WALTON,
His Attorneys.
JNO. W. MADDOX.
C. E. ANDERSON.

Approved M'ch 5, '89.

JAS. P. HART, *Cl'k.*

Endorsed on petition and bond: No. 8837. S. B. Burck *vs.* Abner

Taylor. Petition and bond for removal to U. S. C. C. Filed M'ch 5, 1889. Jas. P. Hart, cl'k. A. L. Matlock, Walton, Hill & Walton, for motion.

51 *Order of Removal. June 21st, 1889.*

S. B. BURCK
vs.
ABNER TAYLOR. } 8837.

And now, on this day, came on to be heard the motion of the defendant to transfer this cause to the circuit court of the United States for the western district of Texas, at the Austin branch thereof, and it appearing to the court from the petition that the matter in dispute exceeds the sum of two thousand dollars exclusive of interest and costs of suit, and that the controversy is between citizens of different States, and said defendant having filed his petition and bond for removal, said bond is approved, and ordered that all further proceedings in this cause in this court be, and the same are hereby, suspended.

52 *Bill of Costs.*

Clerk's fees:			Sheriff's fees:		
Docketing suit		20	R. E. White, sh'ff Travis Co., citation and mileage	1	75
Issuing cit. & dup.		75			
Entering appearance		30			
4 copies int's & 4 com.	14	25	Miscellaneous:		
Taking bond	1	50	Dep's of S. B. Burck, paid by defendant	15	00
Filing 10 papers	1	50			
Ent. judgment removing		75	Dep's of Abner Taylor, paid by plaintiff	4	60
Taxing cost		25			
Transcript (14421)	28	85	Clerk's fees forward	48	35
Clerk's fees	$48	35	Total	$69	70

53 THE STATE OF TEXAS, }
County of Travis. }

I, James P. Hart, clerk of the district court within and for said county and State, do hereby certify that the foregoing, on fifty-eight pages, contains a true and correct transcript of all proceedings, orders, &c., had in cause No. 8837, of S. B. Burck *vs.* Abner Taylor, as same appears now of record and on file in this office.

In testimony whereof witness my hand and seal of office, [SEAL.] in Austin, this the 8th day of July, anno Domini 1889.

JAS. P. HART,
Clerk Dist. C't, Travis Co., Texas.

Endorsed: No. 2157. S. B. Burck *vs.* Abner Taylor. Filed Aug. 3, 1889. D. H. Hart, clerk.

54 *Motion to Remand to State Court.*

In the United States Circuit Court in and for the Western District of Texas, at Austin.

S. B. BURK
vs.
ABNER TAYLOR.

Now comes the plaintiff in the above-styled cause and moves this court to remand this cause to the district court of Travis county because the jurisdiction of said district court to try this case has not been interrupted, nor has this court acquired jurisdiction to try the same by the removal procedure taken by the defendant in this case for the following reasons:

1st. Because as neither the plaintiff nor the defendant is a resident of the western district of Texas, this suit could not have been originally brought in this court, and as this court cannot acquire jurisdiction by removal from a State court of a case which could not have been originally brought in this court, it must follow that this court has no jurisdiction to try this case.

2nd. Because it appears from the record that the petition and bond for removal were not presented to the district court of Travis county for approval of the bond or to pass on the petition until long after the time when the defendant was required by the laws of Texas to answer the plaintiff's petition.

3d. Because the defendant did not enter his appearance in the district court of Travis county, and there is no condition in the bond for removal obligating himself to appear in this court as is required to be in such bond by law.

55 4th. Because the defendant waived his right of removal from the State court, if any he had, by invoking the jurisdiction of the State court to prepare the case for trial in the State court by taking testimony in the State court in a manner to preclude its use in a circuit court of the United States; wherefore he had no right of removal at the time the removal was attempted.

F. G. MORRIS,
Att'y for Plaintiff.

Endorsed: No. 2157. S. B. Burk *vs.* Abner Taylor. Motion to remand. Filed Aug. 5, 1889. D. H. Hart, clerk.

Order on Motion to Remand.

S. B. BURCK
vs.
ABNER TAYLOR. } No. 2157.

On the 12th day of August, 1889, came on to be heard the motion of plaintiff to remand this cause to the Travis county district court, and, argument having been heard upon the same, it was taken under

advisement by the court until this the 16th day of August, when, the court having duly considered the same, it is ordered that said motion be, and the same is hereby, overruled; to which ruling plaintiff in open court excepts.

56 *Motion to Transfer to Equity Side of the Court and for Order to Replead.*

In the United States Circuit Court in and for the Western District of Texas, at Austin.

S. B. BURCK
vs.
ABNER TAYLOR.

Now comes the plaintiff in the above-styled cause and, showing to the court that this case is one of equitable cognizance, as appears from the pleadings, moves the court to transfer the same to the equity side of this court and order that it be docketed on the equity docket of this court, and that the plaintiff have leave to file an amended bill of complaint on or before the first Monday in October, and that the defendant be required to plead, demur to, or answer the same on or before the first Monday in November without further subpœna, and that the case further proceed, subject to the equity rules of this court.

F. G. MORRIS,
Att'y for Plaintiff.

Endorsed: No. —. S. B. Burck *vs.* Abner Taylor. Motion to transfer the case to the equity docket and for leave to amend, &c. Filed Aug. 16, 1889. D. H. Hart, clerk.

57 *Order of Court on Motion to Transfer to Equity Side of Court and to Replead.*

S. B. BURCK
vs.
ABNER TAYLOR. } No. 2157.

On this day came on to be heard the motion of plaintiff to transfer this case to the equity side of this court and for order for repleading; and the same being considered by the court, it is ordered by the court that this case be transferred to the equity side of this court and docketed on the equity docket, and that plaintiff have leave to file an amended bill of complaint as a substitute for his pleadings now on file on or before the first Monday in October, 1889, and that the defendant be, and he is hereby, required to demur, plead to, or answer said bill when so filed on or before the first Monday in November, 1889, without further subpœna, and that this suit be further proceeded with according to the rules and practice in equity governing this court in equity cases.

Plaintiff's Bill of Complaint.

In the United States Circuit Court in and for the Western District of Texas.

S. B. BURCK
vs.
ABNER TAYLOR. } No. —. In Equity.

Now comes the plaintiff in the above-styled cause and, by leave of the court heretofore granted in this cause, files his amended bill of complaint as follows:

To the judges of the circuit court of the United States in and for the western district of Texas:

58 S. B. Burck, of Galveston county, State of Texas, and a citizen of the State of Texas, brings his bill against Abner Taylor, of Cook county, State of Illinois, and a citizen of the State of Illinois, and thereupon your orator complains and says that heretofore, to wit, on the 18th day of January, A. D. 1882, the State of Texas, acting by and through Joseph Lee and N. L. Norton, capitol commissioners of the State of Texas, with the approval of O. M. Roberts as Governor of the State of Texas, party of the first part, made and executed a contract with Matthias Schnell, party of the second part, who executed the same with the State of Texas, wherein the said Schnell did covenant and agree and bind himself, among other things, that he would in the very best workmanlike manner and style and method construct, build, erect, complete, and deliver to the State of Texas or its proper officers a capitol building and appurtenances thereto of the size and dimensions specified and set forth in plans, specifications, and detail drawings adopted by the said capitol building commissioners with the approval of the Governor and heads of the departments.

2nd. That it was further provided in said contract that the State of Texas, in consideration that the covenants, agreements, and stipulations contained and set forth in said contract should be fully and fairly kept and performed in every particular by the said Schnell in the time and manner therein stipulated and to the entire satisfaction of the State of Texas, through its proper officers, agreed, covenanted, and bound itself to convey to said Schnell the complete and perfect title to three million (3,000,000) acres of land situated in

59 the State of Texas and in the counties of Dallas, Hartley, Oldham, Deaf Smith, Palmer, Castro, Bailey, Lamb, and Hockley, stating that said lands were fully described in a description thereof printed under the direction of the commissioner of the general land office, and that maps of the same were on file in the general land office, and further stipulating that said lands should be conveyed, beginning with survey No. 1, and taken in numerical order as the said Schnell — become entitled to conveyances of land at the several stages of construction in said contract set forth, it being understood and agreed by and between the parties

to said contract that the titles to the said lands should be made to the said Schnell by the commissioner of the general land office on the certificate of the capitol building commissioners, to be countersigned and approved by the comptroller as the work progressed & in installments as thereinafter set forth in said contract, which provided for thirty-five installments of said land to be patented to said Schnell, from time to time, as said work progressed.

It was further provided that the said Schnell should pay into the treasury of the State, through the comptroller, to the credit of the capitol building fund, the sum of twenty thousand dollars to reimburse the State of Texas for the incidental expenses heretofore paid and incurred by appropriations made by the Seventeenth Legislature and chargeable to the account of the lands reserved for the capitol building, a copy of which contract is made a part of this bill and filed herewith, marked " Exhibit J " for identification.

3rd. That afterwards, to wit, on the 31st day of January, A. D. 1882, the said Matthias Schnell, Charles B. Farwell, John V. Farwell, Abner Taylor, the defendants herein, and Amos
60 C. Babcock, all of the State of Illinois, entered into a contract, executed by each with all the others, wherein it was stipulated and agreed by and between each and all of said parties that the said Matthias Schnell should and that he did thereby assign and set over to the other said parties to said contract an undivided three-fourths interest in said contract for building said capitol for the purpose that the said parties other than Schnell might share in any and all the profits that might arise from said contract the same as the said Schnell, as their interests might appear, which it was agreed therein were to be equal; and it was further stipulated in said contract that the said Charles B. and John V. Farwell, Abner Taylor, and Amos C. Babcock should furnish whatever money might be needed or necessary for the proper construction of said capitol or for the execution of said contract, as the same might be required from time to time; and, further, that the said Matthias Schnell should have the management and superintendence of the building and construction of said state-house from the commencement to its completion, subject to the direction and control of the majority in interest in said contract. A salary of five thousand dollars per annum, payable monthly, and thirteen thousand dollars which was conceded to be owing to said Schnell out of their said joint undertaking, which amount it was stipulated should be repaid to said Schnell out of money to be realized from the sale of some of the lands to be obtained from the State for the building of said capitol building, together with interest at the rate of six per cent. per annum; and it was further stipulated in said — that after
61 the said thirteen thousand dollars should be paid to said Schnell the other parties to said contract should have all the remaining profits until all the money advanced as stipulated should be paid, with six per cent. per annum interest from the time said money should be advanced, and all the other profits should be divided as their interests appeared under the contract, or to their heirs or assigns, thereby recognizing and stipulating that said con-

tract should be binding on all of said parties in favor of the assignee or assignees of any one of the parties to said contract.

That said contract between said several parties was assented to by the State of Texas, by writing signed by the Governor of Texas and the capitol commissioners, with the advice and consent of the heads of the departments of the State government, and a copy of the same is made a part of this bill and filed herewith, marked "Exhibit L" for identification.

And your orator says that by reason of the execution of the aforesaid contract the parties thereto became partners in the building of the capitol building for the State of Texas and in the profits that might arise therefrom, and agreed and contracted with each other that any one or more of said parties might assign his or their interest in the profits to arise from the carrying out of said contract with the State of Texas, and that such assignment or assignments should be binding on and respected by the members of said partnership.

4th. That on the same day that the said contract between the said Schnell, Abner Taylor, and others was executed as aforesaid
62 the said Schnell, with the knowledge and assent of the said partnership, executed with J. M. Beardsley, James S. Drake, and A. A. Burck, who executed the same with said Schnell, a certain contract in writing, wherein the said Schnell stipulated that for and in consideration that the said contract with the State of Texas and the said contract with said Abner Taylor and others, hereinbefore described, were each had and obtained by said Schnell by and through the assistance, services, time, labor, and expenditure of the said Beardsley, Drake, and Burck by them severally rendered, performed, and paid for, and at the request of him, the said Schnell, and in consideration of the sum of one dollar to the said Schnell paid severally by each of the said parties, he, the said Schnell, agrees to assign and set over and transfer, and does thereby assign, set over, and transfer, to each of the said parties (to wit, Beardsley, Drake, and Burck) an undivided one-fourth part of an undivided one-fourth share and interest held and owned by the said Schnell in and under the said contracts with the State of Texas and with the said Taylor, Babcock, and Charles B. and John V. Farwell, excepting only the amounts allowed and to be paid the said Schnell for salary as superintendent and monies expended by him as named by him in his said contract with Abner Taylor and others, it being further stipulated that it was meant thereby to transfer and set over to said named James M. Beardsley, James S. Drake, and A. A. Burck, separately and severally, an undivided one-fourth part of all and whatever share, interest, advantage whatever, whether in moneys, lands, or otherwise, which he, the said Schnell, may be entitled to have or receive at any time under or by virtue of the contracts
63 with the State of Texas and with Abner Taylor and others, excepting only the five thousand dollars agreed to be paid him for his services as superintendent and thirteen thousand dollars for monies due and owing him under said contract with Abner Taylor and others; and that it was furthermore agreed that this contract

should be binding upon and inure to the executors, administrators, heirs, and assigns of the several parties to the same respectively, and that the same should be recognized by the parties and trustee named in the said contract between the said Schnell and said Abner Taylor and others. A copy of the said contract with the said A. A. Burck and others is made a part of this bill and filed herewith and marked "Exhibit E" for identification.

And your orator now alleges that by reason of the premises the said A. A. Burck acquired a right to demand and receive of and from said partnership between the said Matthias Schnell, Abner Taylor, Amos C. Babcock, Charles B. & John V. Farwell, and their successors and assigns in the building of said capitol under said contract with the State of Texas one-sixteenth part of the profits that might arise from the building of said capitol under said contract after the said Schnell should be reimbursed in expenditures mentioned in said contract as having been expended by him, and which said assignment by said Schnell, one of the partners in said partnership, of said part of his part of the profits to accrue, gave the said A. A. Burck a right to call for and have an account taken of the profits which accrued from the building of said capitol under said contract when the same should be completed and said capitol building should be accepted by the State of Texas..

64 5th. That afterwards, to wit, on the 9th day of May, 1882, the said Matthias Schnell executed in writing his certain assignment, wherein he stated that for and in consideration of the sum of fifteen thousand five hundred dollars to him then paid, the receipt of which he therein acknowledged, he had transferred, released, and conveyed to Charles B. Farwell, John V. Farwell, Abner Taylor, and Amos C. Babcock, who compose the firm of Taylor, Babcock & Co., all the rights and interests which he, the said Schnell, has in and under a certain contract mady by him with Joseph Lee and N. L. Norton, commissioners for the construction of a new state-house for the State of Texas, and all the interests, rights, or claims which he then had or might thereafter assert by virtue of any contract made by him with said Taylor, Babcock, Charles B. and John V. Farwell regarding the construction of said state-house or the superintendency thereof, and all interests accruing to him from any contract regarding the building of said state-house for the State of Texas, which said assignment by said Schnell was accepted by said Taylor, Babcock & Co., and said assignment was assented to by the State of Texas, in writing, signed by the Governor of Texas and capitol building commissioners, with the advice and consent of the heads of the departments of the State government. A copy of said assignment by said Schnell to said Taylor, Babcock & Co. is herewith filed and made a part of this bill and marked "Exhibit M" for identification.

6th. That afterwards, to wit, on the twentieth day of June, 1882, the said Charles B. Farwell, John V. Farwell, Amos C. Babcock, and Abner Taylor executed a contract in writing between themselves,

65 wherein it was stipulated and agreed that, in order the more effectually aud properly to carry out the provisions of the

said contract with the State of Texas, and in consideration of the sum of five dollars to the said firm of Taylor, Babcock & Co. paid, and for certain other good and sufficient considerations, they, the said firm of Taylor, Babcock & Co., composed of the members aforesaid, did thereby transfer and assign to the said Abner Taylor the said contract to construct, build, erect, complete, and deliver to the State of Texas a capitol building and appurtenances thereto, according to the plans and specifications therein referred to and made a part of this assignment, and each and every, all and singular, the rights, profits, and benefits thereunder, the same to be by him carried out in the same manner as provided for in the original contract between the State of Texas and Mathias Schnell. A copy of said assignment to Abner Taylor is herewith filed and made a part of this bill and marked "Exhibit N" for identification.

7th. That said assignment was assented to by the State of Texas, in writing signed by the Governor of Texas and the capitol building commissioners, with the advice and consent of the heads of the departments of the State government, and was accepted by said Abner Taylor, and the said Abner Taylor become substituted in the place of said Schnell as the contractor with the State of Texas to build said capitol under and by virtue of the terms of the said contract between the State of Texas and Mathias Schnell, and the said Abner Taylor thereby become entitled to receive the rights, profits, and benefits that might accrue from the carrying out of said contract and the fulfillment by the State of its obligations therein set forth; and your orator further alleges that by reason of the premises the said Abner
66 Taylor become substituted in the place of said firm of partners at first composed of Mathias Schnell, Abner Taylor, Amos Babcock, John V. Farwell, and Charles B. Farwell, which existed, as is hereinbefore alleged, after the assignment by said Schnell to the other parties just mentioned of three-fourths interest in the said capitol contract, wherein they undertook to build said capitol under said contract as partners, as hereinbefore alleged, with the right of any one or more of the parties thereto to assign his interest therein in whole or in part, and with the provision that such assignments should be binding on the said partners to said contract or their assigns; that the said Matthias Schnell, having assigned to the said A. A. Burck a right to one-sixteenth interest in the profits that might arise from the construction of said capitol under said contract with the State of Texas, and having made such assignment to said Burck at the time said partnership was existing, as hereinbefore alleged, with the knowledge and assent of said firm as it then existed, the right of the said A. A. Burck to have one-sixteenth of the profits that might arise from the carrying out of said contract and to have an accounting therefor became binding upon said firm and its assignees. Wherefore, having become substituted in the place of said firm by assignments of the interest of the respective partners therein, as hereinbefore set out, *to* the said Abner Taylor, who was also a member of said firm, became liable to account to the said A. A. Burck for one-sixteenth interest in the profits, if any, that he

might receive from the State of Texas for the fulfillment of said contract with the State of Texas.

67 8th. That the building of said capitol was commenced and undertaken by said Abner Taylor and afterwards, to wit, on the 14th day of April, A. D. 1883, during the construction of said building, the said A. A. Burck, for a valuable consideration paid by your orator, by an instrument in writing herewith filed and made a part of this bill and marked "Exhibit O," sold, transferred, and assigned to your orator one undivided one-half interest in the undivided sixteenth interest of the said A. A. Burck in the profits that might arise to the contractor from the building of the capitol under the terms of said contract, whereby your orator became subrogated to the rights of the said A. A. Burck as to one-half of the said A. A. Burck's interest in the profits aforesaid, and became entitled to demand and receive from the said Abner Taylor, when said contract with the State should be fulfilled acceptably to the State authorities, one thirty-second part of the profits that might arise and accrue to said contractor by reason of the payment in lands of the consideration for the building of said capitol building, and that your orator, by reason of the premises, became entitled to have an account of the necessary and proper expenses and disbursements of building said capitol and the value of the lands received therefor and the rents and profits of the same which were used and enjoyed by said Taylor during the construction of said capitol building, and of such other matters as ought properly to be taken into account in ascertaining the profits arising from consideration received for the building of said capitol building, to the end that your orator might receive his interest in said profits.

68 9th. That the said Abner Taylor, proceeding with the construction of said capitol building, received at the completion of the several stages of construction mentioned in said contract the titles to lands from the State of Texas as installments of the payment to be made for building said capitol as follows:

September 21, 1885, ninety-nine leagues of land.
During the month of July, 1886, fourteen leagues.
During the month of August, 1886, twenty leagues.
During the month of October, 1886, forty-one leagues.
During the month of November, 1886, fourteen leagues.
During the month of December, 1886, 21 leagues.
During the month of January, 1887, ten leagues.
During the month of February, 1887, eleven leagues.
During the month of April, 1887, thirty-five leagues.
During the month of June, 1887, twenty-six leagues.
During the month of August, 1887, one hundred and thirty leagues.
During the month of February, 1888, ninety-eight leagues.
During the month of March, 1888, eight leagues.
During the month of April, 1888, forty-seven leagues.
During the month of May, 1888, eighty-eight leagues.
During the month of June, 1888, six leagues.

That during the month of December or up to the close of said

month, the said year of 1888, said capitol building was completed and accepted by the proper State authorities as having been done in accordance with said contract and the balance of said three millions acres of land were patented to said Abner Taylor; that said capitol building was accepted by the proper State officers as completed, in accordance with said contract, on or before the eighth day of December, 1888.

69 10th. That said lands were of the value of more than four dollars per acre at the time the same were titled to the said Abner Taylor as aforesaid; that the rental value of said lands from and after the same were patented to the said Abner Taylor as aforesaid and until the present time was more than eight cents per acre; that on the 19th day of March, 1886, the said Abner Taylor, by *and* an instrument in writing duly executed and acknowledged in accordance to the laws of the State of Texas, granted, bargained, sold, and conveyed (the same being confirmed by Charles Benjamin Farwell and John V. Farwell) to the Right Honorable John Campbell Hamilton Gordon, Earl of Aberdeen; Quinton Hogg, of the county of Middlesex, in England, and Sir William McArthur, of Holland Park, in said county, four hundred and thirty-eight thousand three hundred and seventy-two (438,372) acres of land, and by the same instrument bound himself to convey to the said vendees all the remaining portion of said three millions of acres of land as fast as the same should be titled to the said Abner Taylor; and your orator is informed and believes and on such information and belief charges the fact to be that said Abner Taylor has from time to time since said 19th day of March, 1886, sold and transferred all the remaining part of said three millions of acres of land through the said vendees, but your orator is not informed as to the dates of said several conveyances, which are within the knowledge of defendant, and the evidence of the same, which is not in the possession of your orator; wherefore your orator prays that defendant set forth in the answer the facts as to the dates of such conveyances and the amount

70 of land conveyed by each of said conveyances by said Taylor; that all of said lands were at the time of such conveyances of the value of more than four dollars per acre and have ever since been of a greater value than four dollars per acre.

11th. That your orator is informed and believes and on such information and belief charges that the expenses of building said capitol was about three millions and seven hundred thousand dollars, but your orator is not informed as to the exact amount of the costs and expenses to which the said Taylor was necessarily subject in the construction of said capitol building, nor as to the time when the same was paid nor as to the items of such expenditures, which are in the knowledge of the defendant, his agents, employees, and attorneys, and are shown by the books of account kept by the defendant, his employees, and accountants, which are not accessible to your orator and the contents of which are unknown to your orator, and as to which the plaintiff prays a specific answer by defendant, and that said books be produced in court.

12th. And your orator further says that the account between your

orator and defendant as to this matter is still opened and unsettled, and that for reason why your orator should not have an account or relief against him the defendant pretends that he had no notice that the said A. A. Burck assigned or transferred to your orator a one-half interest in his, the said A. A. Burck's, one-sixteenth interest in the profits that might arise from the building of said capitol contract, and that the defendant in good faith and without notice purchased from said A. A. Burck for a valuable consideration the said Burck's one-sixteenth interest in said profits after the
71 said A. A. Burck had sold one-half of his said interest to your orator, and therefore refuses to account with plaintiff; whereas the truth is that the said transfer by A. A. Burck to your orator, which has been hereinbefore stated and made a part of this bill as an exhibit, was duly authenticated for registration in the office of county clerk, and was duly recorded in the records of deeds of Travis county, Texas, on the 14th day of April, A. D. 1883, and said Abner Taylor then had notice of the same; whereas the said A. A. Burck did not sell or transfer any of his said interest in said profits to said Abner Taylor until the 27th day of May, 1884.

That the said Abner Taylor ought not to be heard to aver that said registration was not notice to him of the said assignment by A. A. Burck to your orator, for that the formation of the copartnership between Mathias Schnell, Abner Taylor, Amos C. Babcock, Charles B. Farwell, and John V. Farwell, as hereinbefore alleged, wherein it was stipulated that the profits arising from building the capitol should be divided between said parties or with the assignees of either party, the said copartnership caused said contract of copartnership, which contained an assignment by said Schnell of three-fourths of his interest in said capitol contract, to be recorded in the register of deeds of Travis county, whereupon the said A. A. Burck, J. M. Beardsley, and James S. Drake, acting on this means of giving notice of assignments adopted by said partnership, caused their said assignment to be recorded in the office of the clerk of the county court of Travis county in the records of deeds; and afterwards, when the said Schnell assigned his remaining interest
72 in said contract and in the profits that might arise from the fulfillment of the same to the other members of said firm styled Taylor, Babcock & Co., the said firm caused said last-mentioned assignment to be also recorded in the said register of deeds as a means of giving notice thereof; that when the said firm of Taylor, Babcock & Co. and the individual members thereof assigned their interest in said contract to Abner Taylor, the defendant herein, they and said Taylor in their contract of assignment referred to the several mesne assignments of interests in said contract as being of record in the office of the clerk of the county court of Travis county, and referred to said records for full particulars as to said mesne assignments, whereby the said parties concerned in said contract for building said capitol building agreed and established a custom among themselves to give notice of assignments of interests in said capitol contract or in the profits that might arise from the fulfillment of the same by recording such assignments in the records of deeds of Travis county,

Texas, and by their conduct in so recording such assignments and referring to said records and not otherwise giving notice of such assignments led your orator to believe and justified him in believing that said partnership and its assigns would take notice of the assignment by said A. A. Burck to your orator when your orator placed the same on record in the records of deeds of Travis county, duly authenticated for record; that your orator, fully believing that such record would be accepted as notice of the said assignment to your orator, caused his said assignment to be promptly recorded in the records of deeds of Travis county on the 14th day of April,
73 1883, which was more than a year before the said Abner Taylor purchased any interest from the said A. A. Burck.

And your orator further says that said assignment by A. A. Burck to Abner Taylor did not purport on its face to sell or assign to said Taylor the interests in the profits of said capitol contract which the said A. A. Burck had assigned to your orator, but only purported to assign to said Taylor whatever interest the said A. A. Burck had at the time of the said assignment to Abner Taylor or might thereafter have; wherefore the said Abner Taylor, defendant, was placed upon notice and inquiry as to whether said A. A. Burck had parted with any of his interest before the assignment of his remaining interest to the said Abner Taylor, but the said Abner Taylor made no inquiry of said A. A. Burck as to whether he had parted with any of his, the said Burck's, interest, nor did the said Taylor examine or cause to be examined the records of deeds of Travis county for any record of an assignment by said A. A. Burck, notwithstanding the said custom and practice of all the parties concerned in assignments affecting said capitol contract or interest in the profits thereof to record all such assignments and the agreement thereby affected to that method of giving notice of assignments. A copy of said assignment or release by said A. A. Burck to said Abner Taylor is herewith filed and made a part of this bill and marked "Exhibit P" for identification. The plaintiff waives a sworn answer and says that the defendant need not answer under oath.

13th. The plaintiff prays as follows:

1. That an account may be taken under the direction and decree of this honorable court of the expenses and losses neces-
74 sarily or properly made by the said defendant in the construction of said capitol building, and the time when each item of expense was incurred, and that the defendant be credited with the same and interest thereon, at the rate of six per cent. per annum, from the time the same was expended until said capitol building was completed and accepted by the State of Texas.

2nd. That it be ascertained what quantity of land the said Abner Taylor received titles to from the State of Texas in payment in whole or in part for the building of said capitol buiding, and when the said Abner Taylor received *to* the different installments of said land, and whether he has conveyed the same or any part thereof to any person or persons so as to pass to such person or persons the title to said land, and when each of said conveyances was made and the value of said land at the time *of* such conveyance or convey-

ances were made, and that the interest at eight per cent. per annum on the value of said land from the time the same was so sold and conveyed be estimated and offset against the interest allowed the said Abner Taylor on the money expended in the construction of said building until said capitol building was completed and accepted by the State, and that the balance, which will amount to more than seven millions of dollars, be decreed to be the profits resulting to the said Taylor from the building of said capitol building under said contract with the State of Texas, and that the defendant may be decreed to pay to your orator a one thirty-second part of said profits and interest thereon at the rate of eight per cent. per annum from the time of the completion of said capitol building and its acceptance by the State of Texas, and that your orator may have such further or other relief in the premises as the nature *of the*
75 *nature* of the circumstances of this case may require and to your honors shall seem meet.

F. G. MORRIS,
Solicitor for Complainant.

Endorsed: No. 174. Chancery. S. S. Burck *vs.* Abner Taylor. Plaintiff's amended bill of complaint. Filed Octo. 7th, 1889. D. H. Hart, clerk. F. G. Morris, solicitor for plaintiff.

EXHIBIT "J" TO PLAINTIFF'S BILL OF COMPLAINT. Filed October 7, 1889.

Contract for Building New Capitol.

STATE OF TEXAS, }
County of Travis. }

Know all men by these presents—

1. That the following articles of agreement have been made and entered into by and between the State of Texas, acting by and through Joseph Lee and N. L. Norton, the capitol building commissioners, with the approval of O. M. Roberts, Governor of Texas, as party of the first part, and Matthias Schnell, of the city of Rock Island, county of Rock Island and State of Illinois, party of the second part, to wit:

2. The party of the second part, for and in consideration of the stipulations, covenants, and agreements hereinafter made on behalf of the party of the first part, agrees, covenants, and binds himself that he, the said party of the second part, will, in the very best workmanlike manner, style, and method, construct, build, erect, complete, and deliver to the State of Texas, through its proper officers, a capitol building and appurtenances thereto of the size and
76 dimensions specified and set forth in the plans, specifications, and detail drawings adopted by the said capitol building commissioners, with the approval of the Governor and the heads of departments, and now deposited with the comptroller of the State of Texas for safe keeping, and numbered consecutively from (1) one to

(39) thirty-nine, each and all of which plans, specifications, and detail drawings have been signed by both the parties, and are made a part of this contract as fully and expressly in all respects as if they had been at length herein set forth. It is expressly understood that the boiler-house, which, for considerations of safety, is to be located apart from instead of under the main building, the tunnel, pipes, and wires connecting said boiler-house with the main building, and the sewer, which is to extend to the southern limits of the capitol grounds, are all essential parts of the capitol construction, and the completion of the capitol building, as provided for in this contract, includes the completion of every part of the capitol construction set forth in the specifications and plans hereto attached.

3. And the party of the second part further agrees, covenants, and binds himself, for the considerations aforesaid, to do or cause of artisan, mechanic, laborer, or other person whatever, and to furnish all material of every description whatever at his own sole and proper cost, charge, and expense which may be necessary, requisite, convenient, or proper for the full, entire, and perfect erection and completion of the said capitol building and appurtenances thereto, according to the plans, specifications, and detail drawings aforesaid.

77 4. And the party of the second part agrees, covenants, and binds himself to build, erect, and complete the capitol building and appurtenances thereto provided for in the specifications hereto attached, and that he, the said party of the second part, will entirely complete in every particular and deliver the said buildings to the State of Texas through its proper officers, the said capitol building commissioners, on or before the first day of January, A. D. 1888; and it is expressly agreed and understood between the parties hereto that the time specified within which said buildings shall be completed and delivered to the party of the first part is of the essence and substance of this contract; and the party of the second part agrees and binds himself, in case he should fail to build, erect, complete, and deliver the said buildings entire and perfect in all their parts to the party of the first part on or before the said first day of January, A. D. 1888, according to the tenor of this contract in every particular, that he shall pay in cash immediately to the party of the first part, through the comptroller, for each and every day or portion thereof that the said buildings shall remain unfinished or uncompleted after the said first day of January, A. D. 1888, the sum of ($500) five hundred dollars, lawful money of the United States, which said sum is hereby agreed upon and ascertained by the parties hereto as the fixed and liquidated damages sustained by the party of the first part by reason of such failure, and such sum shall not in any case be considered as a penalty or otherwise.

5. And the party of the second part, for the considerations
78 herein expressed, hereby further agrees, covenants, and binds himself that all work to be done on, in, or about said buildings shall be done in the most thorough and workmanlike manner, and all material used in the construction of the same in any manner

whatever shall be in strict accordance with the specifications hereto attached.

6. And it is further covenanted, agreed, stipulated, and understood by and between the parties hereto that the capitol building to be erected under this contract shall be principally of stone and classic in design. Its form shall approximate the Greek cross, with projecting center and flanks, having a rotunda and dome at the intersection of the main corridors. It shall be ($562\frac{2}{12}$) five hundred and sixty-two feet and two inches long, more or less, as shown on detailed plans, exclusive of porticos, and ($274\frac{2}{12}$) two hundred and seventy-four feet and two inches wide, more or less, as shown on detailed plans, at its greatest width. Besides the basement and dome, it shall be three full stories in height, comprising business and storage apartments for the entire executive, legislative, and judicial departments of the State government and containing fire-proof vaults sufficiently large and numerous to contain and efficiently preserve all the archives and papers of the different departments of the State government that may be located in said building, which shall be surrounded and protected by masonry in the most approved manner, and, besides, proper pipes for supplying every department in the building with gas and water, together with apparatus and arrangements for lighting, heating, ventilating, draining, and sewerage; also plumbing, elevators, and all other appliances and conveniences used in any other complete modern State capitol,
79 all of which is more fully set forth in the plans, specifications, and detail drawings aforesaid.

7. And the party of the second part, for the considerations herein expressed, further covenants, agrees, and binds himself that the capitol building commissioners and the superintendent who has been or shall be appointed by the heads of departments, as is provided by law, and his and their successors in office, shall at any and all times examine and inspect any work done or proposed to be done and any materials used or proposed to be used about, in, or upon the said buildings during their construction, and should any work or material not be, in the opinion of the capitol building commissioners, in strict accordance and conformity with the true meaning and intent of the said plans and specifications and detail drawings it may at once be rejected or condemned, and each and every piece and all of said work or material which may be rejected or condemned by said capitol building commissioners shall be removed from the said buildings and from the grounds by the said party of the second part, at his own cost, charge, and expense, immediately or within such time as may be fixed and determined by the said capitol building commissioners.

8. And it is further expressly agreed and understood by and between the parties hereto that the said party of the second part shall not make any claim to or be entitled to receive any damages, allowance, or compensation of any kind whatever from the party of the first part for or on account of the rejection or condemnation by the said capitol building commissioners of any work done or proposed to be done or any material furnished or proposed to be furnished

about, in, or upon the said buildings in the erection, con-
80 struction, and completion thereof.

9. And it is further agreed, covenanted, and understood by and between the parties hereto that the Governor of Texas, the said superintendent, the said capitol building commissioners, and the several heads of departments or any one or more of them shall have the right and privilege at any and all times to examine and inspect each and every part and portion of the work and material being done or used or about to be so done or used in the erection and construction of the said buildings; and, further, that the said party of the second part, his agents or employees, shall at all times render every facility to the said officers for the purpose of examining the work and materials either in the buildings or upon the grounds.

10. And the party of the second part, for the considerations herein expressed, further covenants, agrees, and binds himself that the capitol building commissioners shall have from one to sixty days inclusive after any work is done upon or material placed in the buildings to reject or condemn the said work or material, or both, at any stage in the construction of said buildings; and it is fully and expressly agreed, stipulated, and understood that the party of the first part, with the full and free consent of the party of the second part, hereby reserves the right to condemn or reject any defective work or material or any portion thereof at any stage in the erection or completion of said buildings within the said stipulated time, and any work or material so rejected shall be replaced with proper first-class work and material, as required by the plans and specifications, at the sole and proper cost, charge, and expense of
81 the party of the second part. It is further understood that if any of the stone or other material should be broken, injured, or damaged at any stage in the construction of the said buildings the same shall be replaced by the party of the second part.

11. It is distinctly stipulated, agreed, and understood by and between the parties hereto that all work and materials performed upon or used in the construction of the said buildings shall be strictly first class in every particular, and that the work and labor, skilled and unskilled, shall be performed in the best, most substantial, and thoroughly workmanlike manner, style, and method that the best and most skillful artisans, mechanics, and laborers in their several departments can execute and perform, and that the materials shall not in any respect differ from those samples now in possession of the capitol building commissioners, marked and designated as set forth in the specifications, and should any dispute or controvesy arise as to the character, kind, or quality of any of the work executed or the material furnished or as to the material, style, and method of any of the work performed, a decision in each case shall be based only on the requirement that the material shall not differ aforesaid, and the work shall be performed only in the most skillful and workmanlike manner, style, and method, according to the plans and specifications, and that which may be considered as customary or usual in the construction of other buildings in regard to materials used or

work performed shall in nowise enter into consideration in any decision whatever.

12. It is also further agreed, stipulated, and understood by
82 and between the parties hereto that if any person employed in, about, or upon the work should prove to be incompetent or should persistently refuse to do the work in the manner required or should persistently neglect or slight the work he may be discharged by the capitol building commissioners, and such person shall not be again employed upon the work unless by the written consent of said commissioners.

13. And the party of the second part, for and in consideration of the several covenants and agreements herein contained, further agrees, covenants, and binds himself to pay into the treasury of the State, through the comptroller, to the credit of the capitol building fund the full sum of twenty thousand dollars to reimburse the State of Texas for the incidental expenses heretofore paid and incurred by appropriations made by the Seventeenth Legislature and chargeable to the account of the lands reserved for the capitol building. Said payment is to be so made by the said party of the second part on or before the first day of July, 1882.

14. And the said party of the first part, in consideration that the covenants, agreements, and stipulations herein contained and set forth shall be fully and fairly kept and performed in every particular by the said party of the second part in the time and manner herein stipulated and to the entire satisfaction of the party of the first part through its proper officers, hereby agrees, covenants, and binds itself to convey to said party of the second part the complete and perfect title to three million (3,000,000) acres of land situated in the State of Texas and in the counties of Dallas, Hartley, Oldham, Deaf
83 Smith, Parmer, Castro, Bailey, Lamb, and Hockley, which said lands are fully described in a description thereof printed under direction of the commissioner of the general land office, and maps of the same are on file in the general land office, the part and portion herein contracted to be conveyed beginning with survey No. 1 and taken in numerical order as the party of the second part becomes entitled to conveyance of land at the several stages of construction in the order hereinafter set forth and excluding those heretofore sold or rejected according to said printed description and the said maps on file in the general land office; and it is expressly agreed and understood by and between the parties hereto that the titles to the said lands shall be made to the party of the second part by the commissioner of the general land office on the certificate of the capitol building commissioners as the work progresses and in installments as hereinafter set out.

15. It is expressly agreed and stipulated by and between the parties hereto that no land shall be conveyed to the party of the second part until he shall have first paid into the treasury of the State the ($20,000,00) twenty thousand dollars hereinbefore mentioned and until he shall further have paid off in full each and every laborer, mechanic, artisan, or material man having any claim for work or labor done or material furnished in, about, or upon or in

any way connected with the erection and completion of the said buildings or shall produce the written waiver and consent of the parties having such claims that the said lands may be conveyed to the party of the second part.

84 16. And, further, that as an evidence of the payment and satisfaction of the several claims for labor done and material furnished the party of the second part is bound and obligated to exhibit, furnish, and deliver to the capitol building commissioners, to be by them deposited in the comptroller's office and there kept, duplicate receipted pay-rolls, duplicate receipted bills, showing payment in full for all labor, work, and material performed or furnished in the construction of the said buildings up to the time of the demand for the conveyance of each of the installments of lands herein provided for or the written waiver and consent aforesaid; but the said capitol building commissioners are not bound to receive the said duplicate receipted pay-rolls and duplicate receipted bills as conclusive evidence of the payment and satisfaction of all claims against the contractor for work or labor done or material furnished, but can make any further investigation or inquiry they may see proper, and may refuse to sign the certificate for the conveyance of the land for any reason that may seem to them just and proper.

17. And it is further agreed and understood by and between the parties hereto that if the party of the second part should contest the validity of any claim made against him he may execute and deliver to the comptroller an approved bond in double the amount of said claim, on the approval and acceptance of which by the comptroller the party of the second part may become entitled to receive lands in the same manner as if no claim had been set up against him.

85 18. But it is expressly covenanted, agreed, and understood that nothing in this contract contained shall ever be construed to bind, obligate, or require the party of the first part to assume or pay any indebtedness incurred or owing by the party of the second part incurred or owing for any purpose whatever, whether relating to or connected with the capitol building or otherwise, or that any lien shall be claimed or maintained thereon.

19. And it is hereby agreed by and between the parties hereto that when all claims for work done on the buildings and materials used have been paid off and discharged or releases filed or bonds accepted and the said twenty thousand dollars (20,000.00) has been paid into the State treasury the party of the second part shall receive, in the manner herein set forth, titles to the lands herein agreed to be conveyed in the numerical order heretofore mentioned at successive stages of the construction as follows, to wit:

First. When the excavation shall have been completed to the first-floor line and the $20,000.00 shall have been paid into the treasury of the State, one and one-half per cent. of the entire number of acres of said lands, 1½.

Second. When the sewerage and the concrete-work of the foundation shall have been completed, one and one-half per cent. of said lands, 1½.

Third. When all walls, exterior and interior, shall have been completed within ten feet of the top of the first-floor line, four per cent. of said lands, 4.

Fourth. When all walls, exterior and interior, shall have been completed to the top of the first-floor line and iron columns
86 placed in position, three per cent. of said lands, 3.

Fifth. When the first-floor beams shall have been laid and areas completed to top of first-floor line, two per cent. of said lands, 2.

Sixth. When the water table shall have been completed and iron columns and girders placed in position, three per cent. of said lands, 3.

Seventh. When the cut-stone work, backing, and interior walls of the first story shall have been completed to the top of the band of the stone imposts of the window jambs, two per cent. of said lands, 2.

Eighth. When the work shall have been completed from the top of the band mentioned in foregoing section to the under side of cornice near the line of second floor, three — cent. of said lands, 3.

Ninth. When the cut-stone cornice, backing, and interior walls shall have been completed to the top line of the second floor, beams and iron columns and girders placed in position, three per cent. of said lands, 3.

Tenth. When the beams, walls, and backing, including stone balustrade and brick arches between the jambs, shall have been completed to the top of the balustrade, three per cent. of said lands, 3.

Eleventh. When all the cut-stone work, backing, and interior walls shall have been completed to the top line of the band of the pilasters or colonnades, two per cent. of said lands, 2.

87 Twelfth. When the walls, exterior and interior, and backing shall have been completed to the top line of the intermediate cornice on the line of the second floor and iron columns and girders placed in position, three per cent. of said lands, 3.

Thirteenth. When the beams, cut-stone work, backing, and interior walls and iron columns and girders of the third story shall have been completed and placed in position to the top line of Corinthian caps of pilasters and columns, three per cent. of said lands, 3,

Fourteenth. When the stone cornice, balustrade, urns and pedestals, gables, and all other work connected therewith shall have been completed, five per cent. of said lands, 5.

Fifteenth. When the stone-work of the fourth story, including the beams, columns, or girders, shall have been completed to the top of the stone cornice, four per cent. of said lands, 4.

Sixteenth. When the stone balustrade, urns, carvings, and gables, including the skylight over the State library, shall have been completed, four per cent. of said lands, 4.

Seventeenth. When the roof iron, dome iron, and iron partition, columns, and girders shall have been placed in position, five and three-quarters per cent. of said lands, 5¾.

Eighteenth. When the tin-work of gutters, slate work, and all tops of ventilators shall have been placed in position, one and one-half per cent. of said lands, 1½.

88 Nineteenth. When the iron beams and cut-stone work of

the attic story shall have been completed, together with all columns' girders and skylights, four per cent. of said lands, 4.

Twentieth. When all the iron stairs shall have been placed in position, three per cent. of said lands, 3.

Twenty-first. When the carpenter-work of the basement shall have been completed, one-half of one per cent. of said lands, $\frac{1}{2}$.

Twenty-second. When the carpenter-work of the first story shall have been completed, two and one-quarter per cent. of said lands, $2\frac{1}{4}$.

Twenty-third. When the carpenter-work of the second story shall have been completed, one and three-quarters per cent. of said lands, $1\frac{3}{4}$.

Twenty-fourth. When the balance of the carpenter-work shall have been completed, one and three-quarters per cent. of said lands, $1\frac{3}{4}$.

Twenty-fifth. When the galvanized-iron work and iron arches in roof shall have been completed, three and one-half per cent. of said lands, $3\frac{1}{2}$.

Twenty-sixth. When the boiler-house shall have been completed and the steam-heating apparatus, including the steam-radiators, put in place, three and one-half per cent. of said lands, $3\frac{1}{2}$.

Twenty-seventh. When the electric work and plumbing shall have been completed, one and one-half per cent. of said lands, $1\frac{1}{2}$.

89 Twenty-eighth. When the vault-work shall have been completed, one per cent. of said lands, 1.

Twenty-ninth. When the encaustic tile and hardware and all marble-work shall have been completed and put in place, three and one-quarter per cent. of said lands, $3\frac{1}{4}$.

Thirtieth. When the plastering and stucco-work of the basement, first story, and second story shall have been completed, including house of representatives and senate chamber, three per cent. of said lands, 3.

Thirty-first. When the balance of the plastering and stucco-work shall have been completed, two and three-quarters per cent. of said lands, $2\frac{3}{4}$.

Thirty-second. When all the plate and other glass shall have been placed in position, two and three-quarters per cent. of said lands, $2\frac{3}{4}$.

Thirty-third. When all the painting, oil finished and polished work shall have been completed, one-half of one per cent. of said lands, $\frac{1}{2}$.

Thirty-fourth. When the cut-stone work of steps, concrete-work on the arches, and all work connected therewith shall have been completed, three-quarters of one per cent. of said lands, $\frac{3}{4}$.

Thirty-fifth. When the building, with its appurtenances, is completed and perfected in all its parts in every particular according to this contract, then the party of the second part shall receive titles to the remaining ten per cent. of said lands, 10.

Provided, That the titles shall be conveyed in entire
90 leagues as far as practicable, such reservations being made at any of the stages of construction as may be necessary, and

the number of acres remaining over to which the party of the second part is entitled shall be added to the entire number of acres to be conveyed at the next succeeding stage of the construction.

20. Any change involving any alteration, addition, or reduction in the capitol building shall be made only by means of a new contract to be entered into by and between the same parties in the same manner in which this is now entered into, or in such manner as may be hereafter provided by the Legislature by special enactment or otherwise.

21. And it is hereby further fully covenanted, agreed, and understood by and between the parties hereto, for the considerations herein set forth, that the said capitol building commissioners may at any time inspect the building and materials and inquire into the manner in which the same is being supplied and executed; and if they shall find any variation from the contract in any particular, or that the work has been suspended, they may immediately give written notice to the contractor of the said variation, and that the defective work or material will not be received, or that the work must be immediately resumed; and should the contractor, the said party of the second part, fail within a reasonable time to rectify the said work and furnish proper materials or to resume the work said capitol commissioners shall have power and authority, with the approval of the Governor and heads of departments, to declare the said contract at an end and to relet the same to other parties, as is provided by law; but the said party of the second part shall not thereby be released, but shall remain liable to the party of
91 the first part for any damages sustained by reason of his noncompliance with this contract.

22. In the event this contract should be abandoned or annulled all scaffolding, tramways, and other temporary fixed appliances shall be left in position for the use of the succeeding contractor, which shall be paid for by the latter at a fair valuation to be fixed by the Governor and heads of departments.

23. And it is further covenanted, agreed, and understood by and between the parties hereto that the party of the first part shall have the right to occupy such portion of the capitol grounds as may be necessary, requisite, proper, and convenient for the free use of the present capitol building, which is to be left intact and unobstructed until the completion and delivery of the new capitol building, should the party of the first part so wish and determine.

24. And it is further covenanted, agreed, and understood that the party of the second part shall deliver to the party of the first part the possession of such portions, rooms, and apartments of said new capitol building as may be completed from time to time as soon as the same can be occupied by the several departments and officers of the State government, and shall not unnecessarily detain the possession of any portion, room, or apartment of said building when the same could be occupied with advantage to the State of Texas, but it is expressly understood that such occupancy shall not interfere with the further progress of the work, nor shall the occupancy of any portion of the said buildings be construed to be an accept-

ance of the same in regard to any substantial defect in the material or the construction of the work.

92 25. And it is further covenanted, agreed, and understood by and between the parties hereto that the law passed by the Sixteenth Legislature and known as chapter 106 of the laws of 1879, found on pages 111, 112, 113, 114, and 115 of the session acts of the Sixteenth Legislature, so far as applicable, together with the plans, specifications, and detail drawings, maps, surveys, and descriptions of land heretofore referred to, shall be and remain a portion of this contract in the same manner as if incorporated herein: Provided, that the Legislature may hereafter change the law in reference to superintendence and supervision, so as to devolve additional duties upon the superintendent or the commissioners or may by law associate any other persons or person with the said superintendent and commissioners in the performance of said duties or may abolish the said office of superintendent and commissioners or either of said offices, and make legal provision for said superintendence and supervision, in accordance with the provisions in other respects of this contract.

26. It is further agreed, covenanted, and stipulated by the party of the second part that this contract shall not be assigned, in whole or in part, by the party of the second part without the consent, in writing, of the party of the first part, signed by the Governor of Texas and the capitol building commissioners, with the advice and consent of the heads of departments.

27. And the party of the second part hereby covenants, agrees, and binds itself to commence work on said capitol building on or before the first day of February, 1882, and to have the same fully completed and finished and delivered on or before the first

93 day of January, A. D. one thousand eight hundred and eighty-eight, as hereinbefore stipulated.

28. And the said party of the second part further agrees and binds himself to make such arrangements and provisions as may be necessary for the carrying on and completion of this contract in all its details in case of the death of the said party of the second part, so that the work may not be delayed thereby.

29. And it is expressly agreed, covenanted, and understood by and between the parties hereto that each and all of the provisions, stipulations, and obligations of this contract are to be performed in the city of Austin, county of Travis and State of Texas, and the said party of the second part hereby appoints the county judge, the county clerk, or the register of deeds of Travis county or either of them as an attorney-in-fact, who may, in case of suit upon this contract, accept service of all citations, copies of petitions, notices, or other process, and upon whom service of any such citations, copies of petitions, notices, and process may be made as fully and completely as if made on the party of the second part in person.

30. And it is further agreed and covenanted by the party of the second part that if any of the sureties upon the bond given and bearing even date herewith shall die or become insolvent or remove from the United States, then and in that event the said party of the

second part shall, on being required so to do by the capitol building commissioners, give other bond or an additional bond, as the case may be, conditioned like the first and in whatever amount may be deemed necessary by said commissioners.

94 31. The specifications, plans, and detail drawings heretofore signed by the contracting parties are hereby made a part of this contract; and it is hereby further agreed, covenanted, and stipulated by the contracting parties that portion of article 38, pages 6 and 7 of the said specifications heretofore signed, beginning on line 4 of said article with the word "strips" and concluding on page 7, line 3, with the words "free from sap," is stricken out; and in consideration of this omission of work and material the party of the second part does hereby agree to and will make the inside and all lines of the walls true and plumb and built so that the plastering shall be put on the walls and finished in every respect so as to appear and be in quality of work and material the same as if the elimination of the aforesaid portion of article No. 38 had not been made.

32. And it is hereby agreed and stipulated by and between the parties hereto that the grade line referred to in the specifications hereto attached is to be at an elevation three feet above the present earth level at the centre of the south front of the building as located by the capitol building commissioners: Provided, that said grade line may hereafter be lowered not more than two feet by the commissioners, with the approval of the Governor and the heads of departments, if it shall appear desirable in order to secure a better foundation or for other reasons.

33. This contract is signed in triplicate, the first to be deposited in the comptroller's office, the second to be kept by the capitol building commissioners, and the third to be retained by the party of the second part.

95 34. The State of Texas, acting by and through its capitol building commissioners, with the approval of the Governor, hereby binds itself and the said Matthias Schnell, acting for himself, hereby binds himself, his heirs, executors, and administrators, to keep and perform this covenant, agreement, and contract according to its full intent and meaning in each and all of its parts and stipulations and in every particular whatever.

In testimony whereof we have hereto set our several signatures this the eighteenth (18th) day of January, one thousand eight hundred and eighty-two.

JOSEPH LEE,
N. L. NORTON,
Capitol Building Commissioners.

Approved.

O. M. ROBERTS,
Governor of Texas.
MATTHIAS SCHNELL,
Contractor.

Witnesses:

We certify that the above contract in full, with the marginal note added, section 25, and all other interlineations, were signed in our presence by the parties thereto.

W. H. KING.
N. G. SHELLEY.

We, the undersigned, members of the capitol building board, hereby certify that we have determined and approved the period fixed in the foregoing contract for the construction and completion of the capitol building and its appurtenances.

O. M. ROBERTS,
Governor, and President Capitol Board.
F. R. LUBBOCK, *Treasurer.*
96 W. M. BROWN, *Comptroller.*
W. C. WALSH,
Commissioner G. L. O.
J. H. McLEARY,
Attorney General.

THE STATE OF TEXAS, }
County of Travis. }

Before me, Osceola Archer, a notary public in and for said county of Travis, duly commissioned and qualified, on this day personally appeared W. H. King and N. G. Shelley, known to me to be the persons whose names are subscribed as witnesses to the foregoing instrument of writing, and, after being duly sworn by me, they each stated upon oath that they saw Joseph Lee, N. L. Norton, and Matthias Schnell, the persons who executed the foregoing instrument, subscribe the same, and that they had signed the same as witnesses at the request of the said Joseph Lee, N. L. Norton, and Matthias Schnell, the persons who executed the same.

Given under my hand and seal of office on this the eighteenth day of January, A. D. 1882.

[L. S.] OSCEOLA ARCHER,
Notary Public, Travis County, Texas.

THE STATE OF TEXAS, }
Department of State. }

I, T. H. Bowman, secretary of state of the State of Texas, do hereby certify that Osceola Archer, whose genuine signature appears to the foregoing instrument of writing, was at the time of signing the same a notary public within and for Travis county, in the State of Texas, duly commissioned and qualified as such according to law.

97 Witness my official signature and the seal of the State affixed, at Austin, this eighteenth day of January, A. D. 1882.

[L. S.] T. H. BOWMAN,
Secretary of State.

Specifications.

1. The building will be located in the capitol grounds, in such position and location as the board of commissioners shall designate before the contract is executed.

2. For the construction, form, arrangement, extent, and style of work reference to be had to the plans, sections, and detail drawings, and such descriptions and interlineations and figures as on each plan shown describing the same, which are hereby made part and parcel of these specifications.

EXHIBIT "L" TO PLAINTIFF'S BILL OF COMPLAINT. Filed October 7, 1889.

Assignment of Three-fourths Interest in Contract by M. Schnell to Taylor, Babcock & Co.

Memorandum of agreement in duplicate made and entered into this thirty-first day of January, A. D. 1882, by and between Matthias Schnell, of the city and county of Rock Island and the State of Illinois, party of the first part, and Charles B. Farwell, John V. Farwell, Abner Taylor, and Amos C. Babcock, of the same State, of the second part, witnesseth:

That whereas the said Matthias Schnell has made and entered into a certain contract with the capitol building commis-
98 sioners of the State of Texas, Joseph Lee and N. L. Norton, for and in behalf of the State of Texas, for the building of a new state-house for the said State of Texas; and whereas the said Matthias Schnell is unable to perform said contract without the aid and assistance of capitalists; and whereas the above-named second party are desirous of furnishing the necessary means and aid to properly carry out the requirements of said contract—

It is hereby agreed by and between the parties hereto that the said Matthias Schnell shall assign and set over, and by these presents does assign and set over, to the parties of the second part an undivided three-fourths (¾) interest in said contract for the purpose that the said parties of the second part may share in any and all the profits that may arise from same, the same as the party of the first part, as their interests may appear, which is hereby agreed to be equal.

And it is understood and agreed by and between the parties hereto that the parties of the second part are to furnish whatever money may be needed or necessary for the proper construction of said state-house or for the execution of the said contract as the same may be required from time to time.

It is further agreed and understood by and between the parties hereto that the said Matthias Schnell shall have the management and superintendence of the building and construction of said state-house from the commencement to its completion, subject to the direction and control of the majority in interest herein, at a salary of five thousand ($5,000) dollars per annum, payable monthly.

99 And it is further agreed and understood and the parties of the second part hereby acknowledge that there is now due and owing said Matthias Schnell the sum of thirteen thousand ($13,000) dollars, which amount, with six per cent. interest per annum, shall be paid whenever the sum of fifty thousand ($50,000) dollars shall have been realized by the sale of lands named in said contract.

And it is further agreed and understood that after the said thirteen thousand ($13,000) dollars is paid, as provided, that the said parties of the second part are to have all the remaining profits until all the money advanced as above stipulated shall be paid, with six per cent. interest thereon per annum from the time said money is advanced, and all the other profits are to be divided as the interests of the parties appear under the contract or to their heirs or assigns.

It is further agreed by and between the parties hereto that Amos C. Babcock, one of the parties of the second part, shall be the trustee for the parties herein named of each part, to act as and be the trustee to receive the title to be conveyed in pursuance of the contract between the State of Texas and the said Matthias Schnell and receipt for same to the proper officers of said State and do all other things required of the said Schnell pertaining to the conveyance of the lands under said contract with the State of Texas or capitol building commissioners, and to hold the same and to make such conveyances or sales of said lands or any portion thereof from time to time as the parties hereto may direct.

100 And it is further agreed and understood that the majority in interest under this contract shall at all times have the control of the business in all its details and make such arrangements hereafter as to its management as may be to the best interest of parties herein concerned, and to give such directions from time to time to the superintendent or manager as they may deem best to carry said building to completion with the best economy, nothing in this contract heretofore stipulated to the contrary notwithstanding.

And it is further agreed that the said superintendent shall be personally responsible to the parties of the second part for any loss or damages caused or sustained by reason of his neglect or mistakes in prosecution of his duties as such superintendent willfully done.

And it is hereby understood and agreed that this agreement shall be binding and operative from the date of its approval by the Governor of Texas and the heads of departments.

Witness our hands and seals this thirty-first day of January, A. D. 1882.

(Signed) MATTHEAS SCHNELL.
ABNER TAYLOR.
AMOS C. BABCOCK.
JOHN V. FARWELL.
CHARLES B. FARWELL.

STATE OF ILLINOIS, } ss:
County of Cook, }

Before me, E. A. Whipple, a notary public duly commissioned

and qualified in and for said county, this day personally appeared Mattheas Schnell, Abner Taylor, Amos C. Babcock, Charles
101 B. Farwell, and John V. Farwell, whose names appear signed to the above instrument in writing, and acknowledged that they had severally signed and executed the same as their free act and deed for the uses and purposes therein expressed.

Witness my hand and notarial seal, at Chicago, this thirty-first day of January, A. D. 1882.

(Signed) ENOCH A. WHIPPLE,
Notary Public.

STATE OF TEXAS, }
County of Travis. }

We hereby consent to the within assignment of an interest in the contract referred to this the eleventh day of February, 1882.

(Signed) JOSEPH LEE,
N. L. NORTON,
Capitol Building Commissioners.
O. M. ROBERTS, *Governor.*

We advise and consent to the above consent given by the capitol building commissioners and Governor this eleventh February, 1882.

(Signed) F. R. LUBBOCK, *Treasurer.*
J. H. McLEARY,
Attorney General.
W. C. WALSH,
Commissioner General Land Office.
W. M. BROWN, *Comptroller.*

STATE OF TEXAS, }
County of Travis. }

102 I, Frank Brown, clerk of the county court within and for the county and State aforesaid, do hereby certify that the within and foregoing instrument of writing, with its certificates of authentication, was filed for registration in my office on the thirteenth day of February, A. D. 1882, at 9.15 o'clock a. m., and duly recorded the thirteenth day of February, A. D. 1882, at 2.15 o'clock p. m., in the records of said county in Book No. 51, pages 526, 527, and 528.

Given under my hand and seal of office this thirteenth day of February, A. D. 1882.

(Signed) FRANK BROWN,
Clerk County Court, Travis County, Texas,
By THOMAS F. NEAL, *Deputy.*

EXHIBIT "E" TO PLAINTIFF'S BILL OF COMPLAINT. Filed October 7, 1889.

M. Schnell—Agreement with J. M. Beardsley et al.

Memorandum of agreement made and entered into this 31st day of January, A. D. 1882, by and between Matthias Schnell, of the

county of Rock Island and State of Illinois, party of the first part, and James M. Beardsley and James S. Drake, of the county and State aforesaid, and A. A. Burch, of the county of Milam and State of Texas, parties of the second part, witnesseth: That whereas said Matthias Schnall has made and entered into a certain contract with Joseph Lee and N. L. Norton, capitol building commissioners of the State of Texas, for and on behalf of said State, for the build-
103 ing of a new state-house for said State of Texas, and has this day also made and entered into another and further contract with Chas. B. Farwell, John V. Farwell, Abner Taylor, and Amos C. Babcock, all of the State of Illinois, for the procuring of the necessary means and aid to enable him to properly carry out and perform the said first-named contract; and whereas the said contracts and each of them were had and obtained by him, said Schnell, by and through the assistance, services, time, labor, and expenditures of the said several parties of the second part, by them severally rendered, performed, and paid for and at the request of him, said Schnell:

Now, for and in consideration of the premises and of one dollar to him paid severally by each of the parties of the second part, he, the said party of the first part, herein agrees to assign, set over, and transfer, and does hereby assign, set over, and transfer, to each of said named parties of the second part herein an undivided one-fourth part of an undivided one-fourth share and interest held and owned by him, said party of the first part, in and under the contract hereinabove mentioned and referred to, excepting only the amounts allowed and to be paid him, said Schnell, party of the first part herein, for salary as superintendent and for moneys expended by him as named in said contract, meaning hereby to transfer and set over to said named James M. Beardsley, James S. Drake, and A. A. Burck separately and severally an undivided one-fourth part of all and whatever share, interest, advantage whatever, whether in moneys, lands, or otherwise, which he, the said Schnell, may be entitled to have or receive at any time under or by virtue of the contracts herein mentioned and referred to, excepting only to the
104 $5,000 agreed to be paid him for his services as superintendent and thirteen thousand dollars for monies due and owing him under said contract secondly above named; and it is furthermore agreed that this contract shall be binding upon and inure to the executors, administrators, heirs, and assigns of the several parties hereto respectively, and that the same shall be recognized by the parties and trustee named in the contracts herein referred to.

In witness whereof the several parties herein have hereto set their hands and seals the day and year first above written.

MATTHIAS SCHNELL. [SEAL.]
JAMES S. DRAKE. [SEAL.]
JAMES M. BEARDSLEY. [SEAL.]
A. A. BURCK. [SEAL.]

Witness:
A. C. BABCOCK.

THE STATE OF TEXAS, }
County of Travis. }

Before me, Flavius Everett, a notary public in and for the county of Travis and State of Texas, duly commissioned and qualified, on this day personally appeared A. C. Babcock, known to me to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me stated on oath that the grantors, Matthias Schnell, James S. Drake, James M. Beardsley, and A. A. Burck, acknowledged in his presence that they had executed the same for the purposes and considerations therein expressed, and that he had signed the same as a witness at the request of said grantors.

Given under my hand and official seal this the 14th day of February, A. D. 1882.

[SEAL.] FLAVIUS EVERETT,
Notary Public, Travis County, Texas.

105 Filed February 14th, 1882, at 10.30 a. m. Recorded February 16th, 1882, at 4.15 p. m.

STATE OF TEXAS, }
Travis County. }

I, Frank Brown, clerk county court, Travis county, certify the above and foregoing to be a true and correct copy of the agreement between Matthias Schnell and James M. Beardsley *et al.* as the same appears of record in Book 51, pages 549, 550, 551, deed records of Travis county.

Witness my hand and official seal this 24th January, 1889.

FRANK BROWN,
Clerk C. C., T. C.

EXHIBIT "M" TO PLAINTIFF'S BILL OF COMPLAINT. Filed October 7, 1889.

Assignment of Remaining Interest in Contract by M. Schnell to Taylor, Babcock & Co.

THE STATE OF TEXAS, }
County of Travis. }

Know all men by these presents that I, Matthias Schnell, a citizen of Rock Island, in the State of Illinois, for and in consideration of the sum of fifteen thousand five hundred dollars to me now paid, the receipt whereof I do now acknowledge, have transferred, released, and conveyed to Charles B. Farwell, John V. Farwell, Abner Taylor, and Amos C. Babcock, who compose the firm of Taylor, Babcock & Co., all the rights and interest which I have in and under a certain contract made by me with Joseph Lee and N. L. Norton, capitol commissioners, for the construction of a new state-house for the State of Texas.

106 And I do also, for the consideration hereinbefore expressed, transfer, assign, and release to said parties above named all interests, rights, or claims which I may now or might hereafter assert by virtue of any contract made by me with said parties regarding the construction of said state-house or the superintendency thereof and all interest accruing to me from any contract regarding the building of said state-house for the State of Texas.

In testimony whereof I have hereunto set my hand this the 9th day of May, A. D. 1882.

(Signed) MATTHIAS SCHNELL.

THE STATE OF TEXAS, }
County of Travis. }

Before me, Flavius Everett, a notary public in and for the county of Travis and State of Texas, duly commissioned and qualified, on this day personally appeared Matthias Schnell, known to me to be the person whose name is subscribed to the foregoing instrument of writing, and acknowledged to me that he had executed the same for the purpose and consideration therein expressed.

Given under my hand and official seal this the 9th day of May, A. D. 1882.

(Signed) FLAVIUS EVERETT,
Notary Public, Travis County, Texas.

STATE OF TEXAS, }
Travis County. }

This writing witnesseth that Taylor, Babcock & Co., a firm composed of Abner Taylor, A. C. Babcock, John V. Farwell, and Charles B. Farwell, hereby accept the transfer made by M. Schnell in the foregoing instrument, and bind themselves as a firm and individually to carry out the contract heretofore made by Matthias Schnell on the eighteenth day of January, 1882, with Joseph Lee and
107 N. L. Norton, capitol building commissioners, and approved by O. M. Roberts, Governor, to construct, build, and complete and deliver to the State of Texas, through its proper officers, a capitol building, and appurtenances thereto, of the size and dimensions specified and set forth in the plans, specifications, and detail drawings referred to in said contract, by themselves or their assignees, and that they will give bond in accordance with the statute in the term of sixty days from this date, in such manner and form as may be satisfactory to the capitol board and the capitol building commissioners.

Done this tenth day of May, 1882.

(Signed) TAYLOR, BABCOCK & CO.,
By A. C. BABCOCK.

STATE OF TEXAS, }
Travis County, } *ss:*

Before me, Z. T. Fulmore, county judge of Travis county, Texas, this day personally appeared Taylor, Babcock & Co., by A. C. Babcock, known to me to be the person whose name is subscribed to the

foregoing and attached instrument of writing, and he acknowledged to me that he executed the same as and for Taylor, Babcock & Co. for the purposes and consideration therein expressed.

Witness my hand and official seal, at office, in Austin, Texas, May 10, 1882.

(Signed) Z. T. FULMORE,
County Judge, Travis County, Texas.

This certifies that we, the Governor of Texas and the capitol building commissioners, with the advice and consent of the
108 heads of departments, consent to the assignment in the foregoing instrument, made to take effect on the filing of the formal adoption of the contract referred to, and the execution and approval of the bond to carry out the same this tenth day of May, A. D. 1882.

O. M. ROBERTS, *Governor.*
JOSEPH LEE,
N. L. NORTON,
Capitol Building Commissioners.
F. R. LUBBOCK, *Treasurer.*
W. M. BROWN, *Comptroller.*
W. C. WALSH,
Com'r Gen'l Land Office.
J. H. McLEARY,
Attorney General.

STATE OF TEXAS, }
Travis County. }

Before me, Z. T. Fulmore, county judge of Travis county, Texas, this day personally appeared O. M. Roberts, Governor of Texas; Joseph Lee and N. L. Norton, capitol building commissioners; F. R. Lubbock, treasurer of Texas; W. M. Brown, comptroller of Texas; W. C. Walsh, commissioner of the general land office, and J. H. McLeary, attorney general of Texas, known to me to be the persons whose names are subscribed to the foregoing instrument of writing, and they and each of them acknowledged to me that they had executed the same for the purposes and considerations therein expressed.

Witness my hand and official seal, at office, in Austin, Texas, this the tenth day of May, 1882.

109 (Signed) Z. T. FULMORE,
County Judge, Travis County, Texas.

STATE OF TEXAS, }
County of Travis. }

I, Frank Brown, clerk of the county court within and for the county and State aforesaid, do hereby certify that the within and foregoing instrument of writing, with its certificates of authentication, was filed for registration in my office on the tenth day of May, A. D. 1882, at 1 o'clock p. m., and duly recorded the tenth day of May, A. D. 1882, at 2.30 o'clock p. m., in the records of said county, in Book No. 52, pages 327, 328, and 329.

Witness my hand and seal of the county court of said county the date last above written.

(Signed) FRANK BROWN,
Clerk County Court, Travis County, Texas,
By THOMAS F. NEILL, *Deputy.*

EXHIBIT "N" TO PLAINTIFF'S BILL OF COMPLAINT. Filed October 7th, 1889.

Assignment of Contract by Taylor, Babcock & Co. to Abner Taylor.

STATE OF TEXAS, *County of Travis,* } ss:

This writing witnesseth that whereas, on the eighteenth day of January, A. D. 1882, a contract was made and entered into by and between the State of Texas, acting by and through Joseph Lee and N. L. Norton, the capitol building commissioners, with the approval of O. M. Roberts, Governor of Texas, as party of the first part, and Matthias Schnell, of the city of Rock Island and State of Illinois, as party of the second part, that the said party of the second
110 part should, for certain considerations therein set forth, construct, build, erect, complete, and deliver to the State of Texas, through its proper officers, a capitol building and appurtenances thereto according to certain plans and specifications referred to in the said contract and made a part thereof;

And whereas the said Schnell gave a bond in the sum of two hundred and fifty thousand ($250,000) dollars, with sureties, for the faithful performance of the said contract;

And whereas, on the thirty-first day of January, 1882, the said Matthias Schnell did, for a valuable consideration, transfer and assign to Abner Taylor, John V. Farwell, Charles B. Farwell, and Amos C. Babcock a three-fourths (¾) interest in said contract hereinbefore mentioned, which said transfer is of record in the county clerk's office of Travis county, Texas, on pp. 526, 527, and 528 of Book No. 51, to which reference is hereby made for further particulars;

And whereas, on the ninth day of May, A. D. 1882, the said Matthias Schnell, for a valuable consideration, did transfer and assign to Charles B. Farwell, John V. Farwell, Abner Taylor, and Amos C. Babcock, composing the firm of Taylor, Babcock & Company, all the rights and interest which he had in and under the contract with the State of Texas first aforesaid, which said transfer is of record in the county clerk's office of Travis county, Texas, on pp. 327, 328, and 329 of Book No. 52, to which reference is hereby made for further particulars:

Now, therefore, in order the more effectually and properly to carry out the provisions of the said contract with the State of Texas, and in consideration of five dollars to us in hand paid, and for cer-
111 tain other good and sufficient considerations, we, the said firm of Taylor, Babcock and Company, composed of the members

aforesaid, do hereby transfer and assign, and have transferred and assigned, to Abner Taylor, the said contract to construct, build, erect, complete, and deliver to the State of Texas a capitol building and appurtenances thereto according to the plans and specifications therein referred to and made a part thereof, and each and every, all and singular, the rights, profits, and benefits thereunder, the same to be by him carried out in the same manner as provided for in the original contract between the State of Texas and Matthias Schnell as aforesaid.

In witness whereof the said firm of Taylor, Babcock & Co., and each and every member thereof, have hereunto subscribed our names and signatures this, the twentieth day of June, A. D., 1882.

(Signed) C. B. FARWELL.
JOHN V. FARWELL.
AMOS C. BABCOCK.
ABNER TAYLOR.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Jno. T. Chumasero, a notary public in and for the said county, in the State aforesaid, do hereby certify that C. B. Farwel, John V. Farwell, Amos C. Babcock, and Abner Taylor, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that *he* signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

112 Given under my hand and notarial seal this the twentieth day of June, A. D. 1882.

(Signed) JOHN T. CHUMASERO,
Notary Public.

Acceptance of Assignment by Abner Taylor.

STATE OF TEXAS, }
County of Travis. }

Be it known by these presents that whereas, on the eighteenth day of January, A. D. 1882, a certain contract was made and entered into by and between the State of Texas, acting by and through Joseph Lee and N. L. Norton, the capitol building commissioners, with the approval of O. M. Roberts, Governor of Texas, as party of the first part, and Matthias Schnell, of the city and county of Rock Island and State of Illinois, as party of the second part, that the said party of the second part should, for certain considerations therein set forth, construct, erect, build, complete, and deliver to the State of Texas, through its proper officers, a capitol building and appurtenances thereto of the size and dimensions specified and set forth in the plans, specifications, and detail drawings mentioned and referred to in said contract and made a part thereof, a printed copy of the contract aforesaid, including the specifications, being hereto

attached and reference being thereto made for further particulars, the same being marked for identification with the signature of J. H. McLeary;

And whereas the said Schnell gave a bond in the sum of two hundred and fifty thousand dollars, with Matthias Schnell as principal and Abner Taylor, John V. Farwell, Charles B. Farwell,
113 and A. C. Babcock as sureties, for the faithful performance of said contract;

And whereas, on the thirty-first day of January, 1882, the said Matthias Schnell did, for a valuable consideration, transfer and assign to Abner Taylor, John V. Farwell, Charles B. Farwell, and Amos C. Babcock a three-fourths (¾) interest in said contract hereinbefore mentioned as having been made with the State of Texas, which said transfer is of record in the county clerk's office of Travis county, Texas, on pages 526, 527, and 528 of Book No. 51, to which reference is hereby made for further particulars;

And whereas, on the ninth day of May, A. D. 1882, the said Matthias Schnell did, for a valuable consideration, transfer and assign to Charles B. Farwell, John V. Farwell, Abner Taylor, and Amos C. Babcock, composing the firm of Taylor, Babcock and Company, all the rights and interests which he had in and under the contract with the State of Texas first aforesaid, which said transfer is of record in the office of the county clerk of Travis county, Texas, on pages 327, 328, and 329 of Book No. 52, to which reference is hereby made for further particulars;

And whereas, on the twentieth day of June, A. D. 1882, the said Taylor, Babcock & Company, the more effectually and properly to carry out the provisions of the original contract with the State of Texas and for a valuable consideration therein expressed, did transfer and assign to Abner Taylor the said contract to construct, build, erect, complete, and deliver to the said State of Texas a capitol building and appurtenances thereto according to the plans, specifications, and detail drawings therein referred to and made a
114 part hereof, and each and every, all and singular, the rights, profits, and benefits thereunder, the same to be carried out and fully performed in the same manner as provided for in the original contract between the State of Texas and Matthias Schnell as aforesaid:

Now, therefore, in consideration of the fact that, by virtue of the transfers and assignments herein set out, I, the said Abner Taylor, have become the contractor with the State of Texas for the building of the capitol aforesaid, and in consideration of the fact that the capitol building commissioners, together with the Governor of Texas and the several heads of departments, have consented to the several transfers and assignments aforesaid, and in further consideration of the stipulations, covenants, and agreements set forth in the original contract between the State of Texas and Matthias Schnell, to the profits, rights, and benefits of which I have succeeded by virtue of the said contract and the several transfers and assignments aforesaid, I, the said Abner Taylor, have agreed, covenanted, and bound myself, and do by these presents agree, covenant, and bind myself,

unto the State of Texas, through its capitol building commissioners, that I will in every particular carry out, finish, and perform the contract made and entered into by and between the State of Texas and Matthias Schnell, a printed copy of which is hereto attached as aforesaid, in the same manner, style, and method and according to the said terms, tenor, and effect that the said Matthias Schnell was originally bound to do, and I hereby adopt the said contract as my own and assume each and every, all and singular, the obligations therein imposed on the party of the second part as my own
115 as fully and completely as if they had originally been assumed, incurred, and undertaken by me in person, the said contract, of which the printed copy is hereto attached, being hereby incorporated into this contract and made a part thereof.

And I, the said Abner Taylor, do hereby bind myself, my heirs, executors, and administrators, to keep and perform this covenant, agreement, and contract according to its full intent and meaning in each and every, all and singular, of its parts and stipulations, in every particular whatsoever.

In testimony whereof I hereto set my signature this the twentieth day of June, A. D. 1882 (one thousand eight hundred and eighty-two).

[SEAL.] (Signed) ABNER TAYLOR.

STATE OF ILLINOIS, }
Cook County, } ss:

I, John T. Chumasero, a notary public in and for the said county, in the State aforesaid, do hereby certify that Abner Taylor, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this twentieth day of June, A. D. 1882.

(Signed) JNO. T. CHUMASERO,
Notary Public.

116 (NOTE.—A printed copy of the contract and specifications herein referred to as being "hereto attached" will be found in this appendix, marked Exhibit J.

Consent to Assignment of Contract.

STATE OF TEXAS, }
County of Travis. }

In accordance with the provisions of section 26 of the original contract between the State of Texas and Matthias Schnell for building a new capitol, dated eighteenth of January, 1882, we, O. M. Roberts, Governor of Texas, and Joseph Lee and N. L. Norton, capitol building commissioners, acting by and with the advice and consent of

the heads of departments, do hereby consent in writing to the assignment made by Matthias Schnell of his contract to Taylor, Babcock & Co., and to the further assignment made by Taylor, Babcock & Co. of the said contract to Abner Taylor; and we, the said Governor, capitol building commissioners, and heads of departments do hereby recognize Abner Taylor as the contractor, bound in all respects to carry out the contract with the State of Texas in like manner as the original contractor, Matthias Schnell, was bound; and in testimony of our advice and consent having been so given we hereunto subscribe our names officially this the twelfth day of July, 1882.

(Signed) JOSEPH LEE.
N. L. NORTON.

Approved by and with the advice and consent of the heads of the departments.

(Signed) O. M. ROBERTS, *Governor.*

117 STATE OF TEXAS }
Travis County. }

Before me, Z. T. Fulmore, county judge of Travis county, duly qualified, this day personally appeared O. M. Roberts, Governor of Texas, and Joseph Lee and N. L. Norton, capitol building commissioners of Texas, known to me to be the persons whose names are subscribed to the foregoing instrument of writing, and they and each of them acknowledged to me that they executed the same for the purposes therein mentioned.

Witness my hand and the seal of the county court of Travis county, at office, in Austin, Texas, this July 12th, 1882.

(Signed) Z. T. FULMORE,
County Judge, Travis County, Texas.

EXECUTIVE DEPARTMENT, OFFICE OF COMPTROLLER,
AUSTIN, *February 8th*, 1889.

I, John D. McCall, comptroller of public accounts of the State of Texas, do hereby certify that the foregoing attached pages, from one (1) to twenty-seven (27), inclusive, contain a true and correct copy of the original contract for building new capitol, together with Exhibits "J," "K," "L," "M," & "N," on file in my office.

In testimony whereof I hereunto sign my name and affix
[SEAL.] the seal of this office, at Austin, this the 8th day of February, A. D. 1889.

JNO. D. McCALL,
Comptroller Public Accounts.

118 EXHIBIT "O" TO PLAINTIFF'S BILL OF COMPLAINT. Filed October 7th, 1889.

A. A. Burck to S. B. Burck. } Warranty Deed.

THE STATE OF TEXAS, }
County of Travis. }

Know all men by these presents that I, A. A. Burck, of the county of Milam and State of Texas, in consideration of the sum of ten thousand dollars to me in hand paid by S. B. Burck, of the county of Galveston and State of Texas, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed, and released, and by these presents do grant, bargain, sell, convey, and release, unto the said S. B. Burck, heirs and assigns, the following-described property, to wit: One undivided one-half interest in one-sixteenth interest in the capitol contract which was awarded to M. Schnell by the Texas State capitol commissioners, Joseph Lee and N. L. Norton, and transferred to me by said Schnell, together with all and singular the rights, members, improvements, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining:

To have and to hold all and singular the premises above mentioned unto the said S. B. Burck, heirs and assigns forever; and I do hereby bind myself, heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said S. B. Burck, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness my hand, at Austin, this 14th day of April, A. D. 1883.

A. A. BURCK. [SEAL.]

119 THE STATE OF TEXAS, }
County of Travis. }

Before me, H. E. Shelley, notary public, Travis Co., Texas, on this day personally appeared A. A. Burck, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this 14th day of April, A. D. 1883.

[SEAL.]

H. E. SHELLEY,
Notary Public, Travis County, Texas.

THE STATE OF TEXAS, }
County of Travis. }

I, Frank Brown, clerk of the county court within and for the county and State aforesaid, do hereby certify that the within and foregoing instrument of writing, with its certificates of authentica-

tion, was filed for registration in my office on the 20th day of April, A. D. 1883, at 5 o'clock p. m., and duly recorded the 26th day of April, A. D. 1883, at 11 o'clock a. m., in the records of said county, in Book No. 55, pages 421 and 422.

Given under my hand and seal of office this 26th day of April, A. D. 1883.

[SEAL.] FRANK BROWN,
Clerk County Court, Travis County, Texas,
By C. W. HOPKINS, *Deputy.*

Endorsement: Warranty deed. A. A. Burck to S. B. Burck. Filed Ap'l 20th, 1883, at 5 p. m. F. Brown, cl'k. Jeff. Brown, dep. Paid. Filed for record Dec'b'r 19th, 1888, at 6 o'clock p. m. D. F. Cole, cl'k Co. court Oldham Co., Tex., by A. D. Tomb, dep. Filed for record Jan. 7th, 1889, at 8 o'clock a. m. Sid. B. Swink, cl'k co. court Crosby Co. Tex.

120 THE STATE OF TEXAS, }
County of Oldham. }

I, D. F. Cole, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1883, with its certificate of authentication, was filed for record in my office on the 19th day of December, 1888, at 6 o'clock p. m., and duly recorded the 28th day of December, 1888, at 10 o'clock a. m., in the deed records of said county, in Book 3, on pages 121 & 122.

Witness my hand and the seal of the county court of said county, at office, in Tascosa, the day and year last above written.

[SEAL.] D. F. COLE,
Clerk County Court, Oldham County, Texas,
By A. D. TOMB, *Deputy.*

THE STATE OF TEXAS, }
County of Oldham. }

I, D. F. Cole, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1883, with its certificate of authentication, was filed for record in my office on the 19th day of December, 1888, at 6 o'clock p. m., and duly recorded the 28th day of December, 1888, at 11 o'clock a. m., in the deed records of said Dallam county, in Book 2, on pages 110 and 111.

Witness my hand and the seal of the county court of said county, at office, in Tascosa, the day and year last above written.

[SEAL.] D. F. COLE,
Clerk County Court, Oldham County,
By A. D. TOMB, *Deputy.*

121 THE STATE OF TEXAS, }
County of Oldham. }

I, D. F. Cole, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1888, with its certificate of authentication, was filed for record in my office

on the 19th day of December, 1888, at 6 o'clock p. m., and duly recorded the 28th day of December, 1888, at 12 o'clock m., in the deed records of said Hartley county, in Book 3, on pages 69 and 70.

Witness my hand and the seal of the county court of said county, at office, in Tascosa, the day and year last above written.

[SEAL.] D. F. COLE,
Clerk County Court, Oldham County,
By A. D. TOMB, *Deputy.*

THE STATE OF TEXAS, }
County of Oldham. }

I, D. F. Cole, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1883, with its certificate of authentication, was filed for record in my office on the 19th day of December, 1888, at 6 o'clock p. m., and duly recorded the 29th day of December, 1888, at 10 o'clock a. m., in the deed records of said Deaf Smith county, in Book 2, on pages 303 and 304.

Witness my hand and the seal of the county court of said county, at office, in Tascosa, the day and year last above written.

[SEAL.] D. F. COLE,
Clerk County Court, Oldham County,
By A. D. TOMB, *Deputy.*

122 THE STATE OF TEXAS, }
County of Oldham. }

I, D. F. Cole, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1883, with its certificate of authentication, was filed for record in my office on the 19th day of December, 1888, at 6 o'clock p. m., and duly recorded the 29th day of December, 1888, at 11 o'clock a. m., in the deed records of said Castro county, in Book 2, on pages 158 and 159.

Witness my hand and the seal of the county court of said county, at office, in Tascosa, the day and year last above written.

[SEAL.] D. F. COLE,
Clerk County Court, Oldham County,
By A. D. TOMB, *Deputy.*

THE STATE OF TEXAS, }
County of Oldham. }

I, D. F. Cole, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1883, with its certificate of authentication, was filed for record in my office on the 19th day of December, 1888, at 6 o'clock p. m., and duly recorded the 29th day of December, 1888, at 12 o'clock m., in the deed records of said Parmer county, in Book 1, on pages 34 and 35.

Witness my hand and the seal of the county court of said county, at office, in Tascosa, the day and year last above written.

[SEAL.] D. F. COLE,
Clerk County Court, Oldham County,
By A. D. TOMB, *Deputy.*

123 THE STATE OF TEXAS, }
County of Crosby. }

I, Sid. B. Swink, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1883, with its certificate of authentication, was filed for record in my office on the 7th day of January, 1889, at 8 o'clock a. m., and duly recorded the 9th day of January, 1889, at 3.15 o'clock p. m., in the records of said Hockley county, in Book 1, on pages 239 to 243, inclusive.

Witness my hand and the seal of the county court of said county, at office, in Estacado, the day and year last above written.

[SEAL.] SID. B. SWINK,
Clerk County Court, Crosby County.

THE STATE OF TEXAS, }
County of Crosby. }

I, Sid. B. Swink, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1883, with its certificate of authentication, was filed for record in my office on the 7th day of January, 1889, at 8 o'clock a. m., and duly recorded the 9th day of January, 1889, at 5.20 o'clock p. m., in the records of said Lamb county, in Book 2, on pages 205 to 209, inclusive.

Witness my hand and the seal of the county court of said county, at office, in Estacado, the day and year last above written.

[SEAL.] SID. B. SWINK,
Clerk County Court, Crosby County.

124 THE STATE OF TEXAS, }
County of Crosby. }

I, Sid. B. Swink, clerk of the county court of said county, do hereby certify that the foregoing deed, dated on the 14th day of April, 1883, with its certificate of authentication, was filed for record in my office on the 7th day of January, 1889, at 8 o'clock a. m., and duly recorded the 10th day of January, 1889, at 2 o'clock p. m., in the records of said Bailey county, in Book 1, on pages 74 to 79, inclusive.

Witness my hand and the seal of the county court of said county, at office, in Estacado, the day and year last above written.

[SEAL.] SID. B. SWINK,
Clerk County Court, Crosby County.

EXHIBIT "P" TO PLAINTIFF'S BILL OF COMPLAINT. Filed October 7th, 1889.

A. A. Burck. to Abner Taylor. } Deed.

AUSTIN, TEXAS, *May* 27, 1884.

For and in consideration of one dollar, in hand paid, and other valuable considerations I hereby sell, assign, and transfer to Abner Taylor, of the county of Cook, State of Illinois, and A. C. Babcock, of the county of Fulton, said State, all my rights, interest, and claim in and to the contract or contracts from the State of Texas to build or erect a state-house or capitol building in the city of Austin and last-mentioned State derived from a contract or agreement made with Matthias Schnell in Chicago, Cook county, Illinois, bearing date January 31st, 1882, or any interest I may have for build-
125 ing or erecting a state-house or capitol building in the city of Austin, Texas, derived from said Schnell at any time or from any other source, hereby relinquishing to said Taylor and Babcock all right or claim of any character to any and all contracts or agreements that I may have heretofore had or now possess pertaining to building, erecting, or constructing a state-house or capitol building in the city of Austin, State of Texas.

Witness my hand and seal this 27th day of May, A. D. 1884.

A. A. BURCK. [SEAL.]

STATE OF TEXAS, *County of Travis.* }

Before me, N. S. Walton, notary public, Travis county, Texas, on this day personally appeared A. A. Burck, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for all the purposes and considerations therein expressed.

Given under my hand and notarial seal, at Austin, Texas, this 27th day of May, A. D. 1884.

[SEAL.]

N. S. WALTON,
Notary Public, Travis Co., Texas.

Filed May 27th, 1884, at 5.30 p. m.; recorded May 28th, 1884, at 9 a. m.

STATE OF TEXAS, *Travis County.* }

I, Frank Brown, clerk county court, Travis county, certify the above and foregoing to be a true and correct copy of the deed from A. A. Burck to Abner Taylor, as the same appears of record in Book 60, pp. 614, 615, deed records Travis county, Texas.

126 Witness my hand and official seal this 24th January, 1889.

[SEAL.]

FRANK BROWN,
Clerk C. C., T. C.

Endorsed: A. A. Burck to Abner Taylor. Certified copy. No. 174. Chancery. S. B. Burck *vs.* Abner Taylor. Exhibit "P" to plaintiff's bill of complaint. Filed Octo. 7th, 1889. D. H. Hart, clerk.

Defendant's Demurrer. Filed Nov. 4th, 1889.

In the United States Circuit Court for the Western District of Texas.

S. B. BURCK
vs.
ABNER TAYLOR. } In Equity.

The demurrer of Abner Taylor, defendant, to the bill of complaint of S. B. Burck, the above-named plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth that—

First. That the said S. B. Burck is not entitled upon said bill to the relief he prays for, because he had a plain and adequate remedy at law for and because of the matters and things and complaints set up and alleged in his said bill.

127 Second. That the plaintiff hath not in and by his said bill made or stated such a case as entitles him in a court of equity to any relief or to any discovery from this defendant.

Third. Because plaintiff's said bill of complaint is essentially and to all intents and purposes a bill of discovery, and the same is not sworn to or in any manner affirmed or verified beyond the bare naked assertion of facts.

And for special demurrer this defendant, by protestation, not confessing all or any of the matters and things in plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth specially demur to said bill, and for cause of special demurrer showeth—

1st. That said bill, in and about the matters and things contained therein averring the *contest*, substance, and meaning of "Exhibit L," attached to said bill and made a part thereof, is contradictory of and repugnant to and not borne out by the face, substance, meaning, and actual contents of said exhibit, in this: The said bill alleges as follows:

"That on 31st day of January, 1882, that Matthias Schnell, Charles B. Farwell, John V. Farwell, Abner Taylor, the defendant herein, and Amos C. Babcock entered into a contract, executed by each with all the others, wherein it was stipulated and agreed by and between each and all of said parties that Matthias Schnell should and that he did thereby assign and set over to the other said parties to said contract an undivided $\frac{3}{4}$ interest in said contract for building

said capitol, for the purpose that said parties other than
128 Schnell might share in any and all the profits that might arise from said contract the same as the said Schnell, as their interests might appear, which it was agreed therein to be equal."

And the said bill further alleges that "it was stipulated in said contract that after $13,000 should be paid to said Schnell the other parties should have all the remaining profits until all moneys advanced, as stipulated, should be paid, &c., and that all the other profits should be divided as their interests appeared under the contract or to their heirs or assigns, thereby recognizing and stipulating that said contract should be binding on all of said parties in favor of the assignee or assignees of any one of the parties to said contract."

And the bill further says that by reason of the execution of the aforesaid contract the parties thereto became partners in the buildings of the capitol building for the State of Texas and in the profits that might arise therefrom, and agreed and contracted with each other that any one or more of said parties might assign his or their interests in the profits to arise from the carrying out of said contract with the State of Texas, and that such assignment should be binding on and respected by the members of said partnership, whereas in fact the contract on that subject was in terms exactly as follows: It is hereby agreed by and between the parties hereto that the said Matthias Schnell shall assign and set over and by these presents does assign and set over to the parties of the second part an undivided $\frac{3}{4}$ interest in said contract for the purpose that the parties of the second part (meaning C. B. Farwell, J. V. Far-
129 well, Abner Taylor, and A. C. Babcock) may share in any and all the profits that may arise from same the same as the parties of the first part (meaning Matthias Schnell) as their interest might appear, which is hereby agreed to be equal. * * * And it is further agreed and understood that after the said thirteen thousand ($13,000) dollars is paid as provided that said parties of the second part are to have all the remaining profits until all money advanced as above stipulated shall be paid, with six per cent. interest thereon per annum from the time said money is advanced, and all the other profits are to be divided as the interests of the parties appear under the contract or to their heirs or assigns.

2nd. That said bill in and about the matters and things contained therein, averring the contents, substance, and meaning of "Exhibit E," attached to said bill and made a part thereof, is contradictory of, repugnant to, and not borne out by the face, substance, meaning, and actual contents of said exhibit, in this: that said bill of complaint alleges in the fifth subdivision thereof "that by reason of the premises the said A. A. Burck acquired a right to demand and receive from and of the said partnership between said M. Schnell, Abner Taylor, Amos C. Babcock, C. B. Farwell, J. V. Farwell, and their successors and assigns, in the building of said capitol under said contract with the State of Texas $\frac{1}{16}$ part of the profits that might arise from the building of said capitol under said contract after said Schnell should be reimbursed in expenditures mentioned

in said contract as having been expended by him, and which said assignment the said Schnell, one of the partners in said part-
130 nership, of said part of his part of the profits to accrue gave the said A. A. Burck a right to call for and have an account taken of the profits which accrued from the building of said capitol under said contract when the same was completed and accepted by the State—

Whereas in fact and in truth said contract on that subject is in the following exact language:

"That whereas the said Matthias Schnell has made a contract with Joseph Lee and N. L. Norton, capitol building commissioners of the State of Texas, and on behalf of said State for the building of a new state-house for said State of Texas, and has also this day made and entered into another and further contract with C. B. Farwell, J. V. Farwell, Abner Taylor, and Amos C. Babcock for the procuring of necessary means and aid to enable him to properly carry out and perform the said first-named contract; and

"Whereas the said contracts and each of them were had and obtained by him, the said Schnell, by and through the assistance, services, time, labor, and expenditures of the said several parties of the second part by them severally rendered and performed and paid for and at the request of him, the said Schnell:

"Now, for and in consideration of the premises and of one dollar to him paid severally by each of said parties of the second part (meaning Drake, Beardsley, & Burck) he, the said party of the first part (meaning M. Schnell), agrees to assign, set over, and transfer, and does hereby assign, set over, and transfer, to each of said named parties of the second part herein an undivided one-fourth part of an undivided one-fourth share and interest held and owned by
131 him, said party of the first part, in and under the contract hereinabove mentioned and referred to, excepting only the amounts allowed and to be paid him, the said Schnell, party of the first part herein, for salary as superintendent and for moneys expended by him as named in said contract, meaning hereby to transfer and set over to said named James M. Beardsley, James S. Drake, and A. A. Burck, respectively and severally, an undivided one-fourth part of all and whatever share, interest, advantages whatever, whether in moneys, lands, or otherwise, which he, the said Schnell, may be entitled to have or receive at any time under or by virtue of the contracts herein mentioned and referred to, excepting the $5,000.00 agreed to be paid him for his services as superintendent and $13,000 for moneys due and owing him under said contract secondly above named; and it is furthermore agreed that this contract shall be binding upon and inure to the executors, administrators, heirs, and assigns of the several parties hereto respectively, and that the same shall be recognized by the parties and trustees named in the contract herein referred to."

3rd. That said bill in and about the matters and things contained therein averring the contents, substance, and meaning of "Exhibit O," attached to said bill and made a part thereof, is contradictory of,

repugnant to, and not borne out by the face, substance, meaning, and actual contents of said exhibit, particularly in this:

That said bill alleges that said transfer referred to (Exhibit O) was a conveyance of A. A. Burck to plaintiff, whereby was assigned and transferred to plaintiff one undivided one-half interest in the undivided one-sixteenth interest of the said A. A. Burck in
132 the profits that might arise to the contractors from the building of the capitol under the terms of the contract referred to by plaintiff as Exhibit J in the said bill, in the fore part thereof, when in truth and fact said transfer and conveyance, if — conveyed or pretended to convey anything whatever, was a pretended conveyance of one undivided one-half interest in a one-sixteenth interest in the capitol contract (meaning in the capitol contract set out in said bill in Exhibit "J").

4th. The said bill is particularly and fatally defective, in this: The said bill shows on its face that the said capitol contract was awarded to and given by the State capitol commissioners, Lee & Norton, to Matthias Schnell under a contract, in writing, with conditions, limitations, and restrictions, the said contract being Exhibit "J" in plaintiff's bill; that as part and parcel of said contract, viz., section 26 thereof, it is provided as follows: "It is further agreed, covenanted, and stipulated by the party of the second part (meaning the said Matthias Schnell) that this contract shall not be assigned in whole or in part by the party of the second part without the consent, in writing, of the party of the first part, signed by the Governor of Texas and the capitol building commissioners, with the advice and consent of the heads of the departments" (meaning the heads of the executive departments of the State of Texas), whereas said bill wholly fails to allege that the alleged transfer from Matthias Schnell to the said A. A. Burck and others, referred to in said bill as Exhibit "E," and the said transfer from the said A. A. Burck to plaintiff, referred to in the bill as Exhibit "O,"
133 were the one or either of said transfers made with the consent, in writing or otherwise, of the State of Texas (party of the first part, referred to in plaintiff's bill as Exhibit "J"), signed by the Governor and the capitol building commissioners, with the advice and consent of the heads of departments (meaning the heads of the executive departments of the State of Texas).

5th. That the bill of complaint by plaintiff shows upon its face that the defendant, Matthias Schnell, acquired the contract to build the State capitol as shown in Exhibit "J," and on the 31st day of January, 1882, the said Matthias Schnell, for a recited consideration, sold to the defendant and his subsequent vendors a three-fourths interest in the capitol contract, set out in the bill as Exhibit "J," and that afterwards, on the ninth day of May, 1882, the said Matthias Schnell sold to the defendant and his subsequent vendors his remaining interest in the said capitol contract, and fails to allege or show that said subsequent purchase of the remaining interest of said Schnell was purchased by defendant or his said subsequent vendors with actual or legal constructive notice of any right, title, claim, or inter-

est on the part or in behalf of A. A. Burck, the vendor of plaintiff.

6th. That the said bill of complaint is contradictory on its face with its Exhibit "P," which was made part thereof by averment of plaintiff, in this: that said bill alleges that the conveyance from A. A. Burck to defendant only purported to assign to said defendant, Taylor, whatever interest the said A. A. Burck had at the time of said assignment to defendant or "might thereafter"
134 have, when in truth and in fact said Exhibit "P," being conveyance from A. A. Burck to defendant, recites that it is a transfer "of all of my (meaning A. A. Burck) right, interest, and claim in and to the contract or contracts from the State of Texas to build or erect a state-house or capitol building in the city of Austin and last-mentioned State derived from a contract made with Matthias Schnell January 31st, 1882 (as shown in Exhibit "J" of plaintiff's bill) or any interest I may have for building or erecting a state-house or capitol building in the city of Austin, Texas, derived from the said Schnell or from any other source, hereby relinquishing to the said Taylor and Babcock all right or claim of any character to any and all contracts or agreements that I may have heretofore had or now possess pertaining to said building, erecting, and constructing a state-house or capitol building in the city of Austin, State of Texas."

7th. That said plaintiff's said bill recites the conveyance from A. A. Burck to defendant of date May 27th, 1884, it being for a valuable consideration upon its face, and then seeks to avoid the validity of said conveyance by alleging that defendant had notice of the alleged prior conveyance by A. A. Burck to plaintiff; and, for such avoidance, states that defendant "was placed upon notice and inquiry as to whether the said A. A. Burck had parted with any of his interest before the assignment of his remaining interest to the said Abner Taylor, but that said Abner Taylor made no inquiry of the said A. A. Burck as to whether he had parted with any of his, said Burck's, interest nor did the said Taylor examine or cause to
135 be examined the records of deeds of Travis county for any records of any assignment by the said A. A. Burck, notwithstanding the said custom and practice of all the parties concerned in the assignments affecting said capitol contract or interest in the profits thereof to record all such instruments and the agreement thereby affected to that method of giving notice of assignment."

Defendant says that plaintiff's allegation of notice, as stated in this complaint, is in law no notice.

8th. Because the complainant fails to do or to tender to do equity, while he claims what he claims to be equity, in this, he fails to tender the money paid out by respondent in the acquisition of his claim to the said A. A. Burck $\frac{1}{16}$ interest or, at least, $\frac{1}{2}$ thereof. Wherefore and for divers other and good causes for demurrer appearing in the said bill, the defendant doth demur thereto in general and for special causes, as it is lawful to do, and now humbly prays the judgment of this court whether he shall be compelled to make any further or other answer to said bill, and he now prays to

be dismissed with his costs and charges in this behalf, both wrongfully sustained.

ABNER TAYLOR, *Respondent*,
By WALTON, HILL & WALTON & MATLOCK, *His Solicitors.*
WALTON, HILL & WALTON & A. L. MATLOCK,
Sol's for Respondent.

We certify that within our opinion the foregoing demurrers, general and special, are well founded in point of law.

WALTON, HILL & WALTON & MATLOCK,
Attorneys for Defendant.

136 DIST. OF COLUMBIA, } U. S. A. }

Before the undersigned notary public this day personally appeared Abner Taylor, defendant in the foregoing-entitled suit, and, after being duly sworn, on oath says that the demurrers above set out are not interposed for delay.

(Signed) ABNER TAYLOR.

Sworn to and subscribed before me this the 28th day of October, A. D. 1889.

[SEAL.] GEO. W. BAGG,
Notary Public.

Endorsed: No. 174. S. B. Burck *vs.* Abner Taylor. Demurrers of defendant. Filed Nov. 4th, 1889. D. H. Hart, clerk.

Order of Court Sustaining Defendant's Demurrer and Dismissing the Plaintiff's Bill.

S. B. BURCK
vs.
ABNER TAYLOR. } In Equity.

MARCH 4TH, 1890.

This cause came on to be heard on the demurrer to complainant's bill and was argued by W. M. Walton, Esq., for defendant and F. G. Morris, Esq., for complainant; on consideration whereof, it is ordered, adjudged, and decred that said demurrer be, and the same is, sustained; and thereupon, the complainant then and there electing to stand upon his said bill and declining to amend the same, it is further ordered, adjudged, and decreed that said complainant's bill be, and the same is hereby, dismissed with costs.

In open court, March 4th, 1890.

(Signed) DON A. PARDEE,
Circuit Judge.
T. S. MAXEY,
Dist. Judge.

137 In the United States Circuit Court, Western District of Texas, at Austin.

S. B. BURCK
vs.
ABNER TAYLOR. } In Equity.

To the judges of the circuit court of the United States for the western district of Texas:

The petition of S. B. Burck, the complainant in equity in the above-styled cause, respectfully shows that a final decree was rendered in said cause on this the 4th day of March, 1890, and was adverse to the rights of your petitioner; that the matter in dispute in said cause, exclusive of costs, exceeds the sum and value of five thousand dollars; that petitioner conceives *themselves* aggrieved by said decree. Wherefore petitioner now, at this term, when said decree was rendered and entered of record, while the solicitors for the defendant are present in court, doth, in open court, pray an appeal to the Supreme Court of the United States from the decree of this court.

(Signed) F. G. MORRIS,
Solicitor for Plaintiff.

Endorsed: S. B. Burck *vs.* Abner Taylor. Motion for allowance of appeal. Filed March 4th, 1890. D. H. Hart, clerk.

Order Allowing Appeal and Fixing Bond.

In the United States Circuit Court, Western District of Texas, at Austin.

S. B. BURCK
vs.
ABNER TAYLOR. }

MARCH 4TH, 1890.

138 It appearing to the court that the application for the allowance of an appeal from the decree rendered in the above-styled cause, in equity, filed by the plaintiff, S. B. Burck, is in due form, and that the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and the solicitors for the defendant, Abner Taylor, being now present in court and having notice *of* said application for an allowance of an appeal to the Supreme Court of the United States is granted and allowed as prayed for, and that the security to be given by the appellant shall consist of an appeal bond to be given by the appellant, conditioned that *they* will prosecute his appeal to effect and *after* all costs if he shall fail to make good his plea, is fixed at five hundred dollars.

(Signed) DON A. PARDEE,
Circuit Judge.

March 4th, 1890.

Appeal Bond. Filed April 30, 1890.

In the United States Circuit Court for the Western District of Texas, at Austin.

In Re S. B. BURCK
vs.
ABNER TAYLOR.

Know all men by these presents that we, S. B. Burck, as principal, and G. A. Meyer and Herman C. Rener, as sureties, are held and firmly bound unto Abner Taylor, the defendant in the above-styled suit, in the sum of five hundred dollars; for the payment of which, well and truly to be made unto the said Abner Taylor, his heirs, assigns, or legal representatives, we bind ourselves, our heirs, and legal representatives, jointly and severally, firmly by these presents, conditioned, nevertheless, that whereas in the above numbered
139 and styled cause, in the circuit court of the United States in and for the western district of Texas, at Austin, a decree was rendered by said court dismissing the bill of complaint in equity of the said S. B. Burck against the said Abner Taylor, from which decree the said S. B. Burck has taken an appeal to the Supreme Court of the United States:

Now, therefore, if the said S. B. Burck shall prosecute his said appeal to — and answer all costs if he shall fail to make good his plea, then the foregoing obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands this the 24th day of April, A. D. 1890.

(Signed) S. B. BURCK.
G. A. MEYER,
HERMAN C. RENER, *Sureties.*

Bond accepted.

DON A. PARDEE, *Judge.*

UNITED STATES OF AMERICA,
Eastern District of Texas, at Galveston.

Before me, William R. Johnson, a United States commissioner in and for the eastern district of Texas, on this day personally appeared G. A. Meyer, known to me, who, being by me duly sworn, on oath declares that he owns property in the State of Texas, over and above all homestead or other exemptions and subject to execution, in the sum of five hundred dollars.

G. A. MEYER.

140 Sworn to and subscribed before me this day. Witness my hand and official seal this April 24th, 1890.

[SEAL.] WM. R. JOHNSON,
U. S. Commissioner in and for the E. D. Texas, at Galveston.

UNITED STATES OF AMERICA,
Eastern District of Texas, at Galveston.

Before me, William R. Johnson, a United States commissioner in and for the eastern district of Texas, on this day personally appeared Herman C. Rener, known to me, who, being by me duly sworn, on oath declares that he owns property in the State of Texas, over and above all homestead and other exemptions and subject to execution, in the sum of five hundred dollars.

HERMAN C. RENER.

Sworn to and subscribed before me on this day. Witness my hand and official seal this April 24th, 1890.

[SEAL.] WM. R. JOHNSON,
U. S. Commissioner in and for the Eastern District of Texas, at Galveston.

Endorsed: No. 174. Chancery. S. B. Burck *vs.* Abner Taylor. Appeal bond. Filed April 30th, 1890. D. H. Hart, clerk.

141 THE UNITED STATES OF AMERICA,
Western District of Texas.

I, D. H. Hart, clerk of the United States circuit court in and for the western district of Texas and fifth circuit, at Austin, hereby certify that the above and foregoing, on 140 pages, is a true and correct transcript of the proceedings had and orders entered in cause No. 174, equity, of S. B. Burck *vs.* Abner Taylor, as the same appears on file and of record in this office.

The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.

Witness my hand and official seal, at office, in the city of Austin, this the 1st day of July, A. D. 1890.

D. H. HART, *Clerk.*

Endorsed on cover: W. Texas C. C. U. S. No. 1268. S. B. Burck, appellant, *vs.* Abner Taylor. Filed September 4, 1890.

Office Supreme Court U. S.
FILED,
OCT 26 1891
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

S. B. BURCK, APPELLANT,

vs.

ABNER TAYLOR.

BRIEF FOR APPELLANT,

F. G. MORRIS AND F. CHAS. HUME, ATTORNEYS.

In the Supreme Court of the United States.

OCTOBER TERM, 1870.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

S. B. BURCK, APPELLANT,

vs.

ABNER TAYLOR.

This suit was commenced in the district court of Travis county, Texas, on the 8th day of December, 1888, by S. B. Burck, a citizen of Galveston county, State of Texas, against Abner Taylor, a citizen of the county of Cook, State of Illinois. Burck sought to recover one thirty-second part of the profits of building the new State capitol building for Texas, which was built by Abner Taylor, under contract with the State of Texas, made by Matthias Schnell with the State, but to which Abner Taylor succeeded by assignments and substitution. Burck claimed to have acquired his right to a part of the profits of building the capitol by mesne assignments from and under Schnell, while Taylor, Babcock & Co. were the contracters with the State, and Burck claimed that Abner Taylor was their successor by assignment, and liable to account to him for one thirty-second part of the profits resulting from the completion of the work under the contract. Taylor was served with citation in person in Travis county, Texas, for the March term of 1889. At the March term of court the defendant, Abner Taylor, filed his petition and bond for removal of the cause to the United States circuit court for the Western District of Texas at Austin, the ground of removal being that the suit involved a controversy between citizens of different States. The district court suspended proceedings, and a copy of the record was filed in the United States circuit court at Austin, August 3, 1889, and was docketed on the law docket of the court. During a term of said court, on August 5, 1889, the plaintiff filed a motion to remand the cause to the State court, which was overruled by the court, and the cause, on motion of plaintiff, was transfered to the equity side of the court, and leave was granted plaintiff to file an amended bill of complaint. The plaintiff filed his amended bill in equity October 7, 1889, and the questions in the cause arise on the sufficiency of this bill on demurrer. The bill

was one for accounting to ascertain the profits resulting from the building of the State capitol building, for the compensation obtained under the contract, and the bill also sought to discover from defendant some facts in support of complainant's bill.

The bill averred that Matthias Schnell entered into a contract with the State of Texas on the 18th day of January, 1882, to build for the State a new State capitol building in consideration of three million (3,000,000) acres of the public land of the State of Texas, situated in the counties of Dallas, Hartley, Oldham, Deaf Smith, Palmer, Castro, Bailey, Lamb and Hockley, which were fully described in a printed document made under the direction of the commissioner of the general land office and in the maps of the same on file in the general land office. It was alleged that by the provisions of said contract, titles were to be made to said Schnell by the commissioner of the general land office in thirty-five installments as the work progressed. A copy of the contract was made a part of the bill and marked "Exhibit J" for identification. (Rec. 41—52.)

It was further alleged that on January 31, 1882, said Matthias Schnell, Charles B. Farwell, John V. Farwell, Abner Taylor, the defendant herein, and Amos C. Babcock, executed a contract between themselves wherein it was stipulated and agreed that Matthias Schnell should, and that he did thereby, assign and set over to the other parties to said contract an undivided three-fourths interest in said contract for building said capitol, for the purpose that the said parties other than Schnell might *share in any and all the profits* that might arise from said contract the same as the said Schnell as their interest might appear, which interests it was agreed therein were to be equal; and that it was further stipulated in said contract that said Charles B. and John V. Farwell, Abner Taylor and Amos C. Babcock should furnish whatever money might be necessary for the proper construction of said contract, as the same might be required from time to time, and further, that the said Matthias Schnell should have the management and superintendence of the building and construction of said State house from the commencement to its completion, subject to the direction and control of a majority of the interests in said contract, at a salary of five thousand dollars per annum. It was recognized that the further sum of thirteen thousand dollars was due said Schnell and should be paid out of money to be realized from the sale of lands to be obtained from the State; and this being paid, it was stipulated that the other parties to said contract should have all the remaining profits until all the money advanced, as stipulated, should be paid, with six per cent per annum interest from the time said money should be advanced, and that all the other profits should be divided as their interests appeared under the contract, *or to their heirs or assigns*; thereby recognizing and stipulating that said contract should be binding on all of said parties in favor of the *assignees* of the respective parties to said contract. That said contract between these several parties was assented to by the State of Texas, by writing signed by the governor of Texas and the capitol commissioners, with the advice and consent of the heads of the departments of the State government. A copy of this contract was made a part of this bill and marked "Exhibit L" for identification.

(Record, p. 53, 54.) It is averred that by reason of the execution of the aforesaid contract, the parties thereto became partners in the building of the capitol building for the State of Texas and in the profits that might arise therefrom, and agreed that the assignments of interests in the profits that might result from the undertaking should be respected by the parties thereto.

It is further alledged that afterwards, for good and valuable considerations stated in the bill to have been paid, the said Schnell, with the knowledge and assent of his said partners, on the same day of the execution of the contract last mentioned, assigned and set over an undivided one-fourth interest in his, the said Schnell's, remaining undivided one-fourth interest in said profits to each of the following named parties, to-wit: J. M. Beardsley, James S. Drake and A. A. Burck, aggregating three-fourths of the said Schnell's one-fourth interest in the profits to result from carrying out said contract. That it was stipulated in said contract that the same should be *binding upon* and inure to the executors, administrators, heirs and *assigns* of the several parties thereto respectively; whereby the said A. A. Burck acquired a right to demand and receive of and from said partnership between the said schnell, Taylor, Farwells and Babcock, and their successors and assigns in building said capitol under said contract, one-sixteenth part of the profits that might arise therefrom, and that thereby the said A. A. Burck became entitled to an accounting to ascertain the profits which accrued from the building of said building under said contract. A copy of said contract between Beardsley, A. A. Burck and others was filed with the bill and made a part thereof, and marked Exhibit "F" for identification. (Rec. pp. 55, 56.)

It was further alleged that on the 9th day of May, 1882, said Schnell sold and transferred all his remaining interest in the contract to build the capitol to Cnas. B. Farwell, John V. Farwell, Abner Taylor and Amos C. Babcock, who composed the firm of Taylor, Babcock & Co., which assignment was assented to by the State through its proper officers, and by means of which the said Taylor, Babcock & Co. became substituted as contractors with the State in the place of Schnell. A copy of said assignment was filed with and made a part of the bill, and marked Exhibit "M" for identification. (Rec. pp. 35, 57, 58.)

The bill further states that on the 20th day of June, 1882, Charles B. Farwell, John V. Farwell, Amos C. Babcock and Abner Taylor executed a contract in writing botween themselves, wherein it was stipulated that in order the more effectually and properly to carry out the provisions of the said contract with the State of Texas, and in consideration of the sum of five thousand dollars paid to said firm of Taylor, Babcock & Co., said firm did thereby transfer and assign to said Abner Taylor the said contract to construct said building and all and singular the rights and benefits thereunder, which assignment was assented to by the State of Texas through its proper officers, whereby Abner Taylor became substituted in the place of Schnell as the contractor with the State, and would be entitled to receive the rights, profits and benefits that might arise therefrom, and to account to said A. A. Burck for his said interest in the profits that might arise from

the building of the capitol for the compensation stated in said contract. A copy of said assignment to Abner Taylor was filed with and made a part of the bill, and marked Exhibit "N" for identification. The bill averred that while said building was being built, to-wit, on the 14th day of April, A. D. 1883, said A. A. Burck, for a valuable consideration paid by this plaintiff, S. B. Burck, sold, transferred and assigned to plaintiff, S. B. Burck, one-half interest in his, said A. A. Burck's, one-sixteenth interest in the profits that might accrue from the building of said capitol building under said contract with the State, which interest in the profits of said undertaking the said S. B. Burck would become entitled to demand and receive from the said Abner Taylor when said contract with the State should be fulfilled to the satisfaction of the State authorities, and that said contracts entitled plaintiff to an accounting with Taylor to ascertain the profits. A copy of the assignment to S. B. Burck was made a part of the bill, and marked Exhibit "O" for identification. (Rec. p. 65.)

The bill then stated the number and amount of installments of lands which had been patented to Abner Taylor at different stated dates during the construction of the building, and the value thereof per acre, and that during the month of December or up to the close of said month in the year 1888, said capitol building was completed, and on or before December 8, 1888, was accepted by the proper State authorities as having been done in accordance with said contract, and that the balance of said 3,000,000 acres of land were patented to said Abner Taylor. That the lands were of the value of more than four dollars per acre at the time they were patented to Abner Taylor; that the rental value thereafter and until the present time was more than eight cents per acre; that on the 19th day of March, 1886, the said Abner Taylor sold and conveyed to parties named in the bill 438,372 acres of said land and contracted to convey the remainder to the same parties as fast as patents should be issued to said Taylor for the same, which agreement to convey it is alleged on information and belief was carried out by the conveyance of the balance of said land but that the dates of the other conveyances were unknown to plaintiff, and he prayed that defendant, being specially informed on this subject, might set forth in his answer what conveyances of said land he had made, and the dates of such conveyances. Plaintiff alleged that the land was of the value of more than four dollars per acre at the time of such conveyances.

The expense of building said capitol, plaintiff alleges, on information and belief, to have been about three million dollars, but said he was not informed as to the exact amount of the cost and expenses to which the said Taylor was necessarily subject in the construction of the said capitol building, nor as to time when the same was paid, nor as to the items af such expenditures, which are in the knowledge of the defendant, his agents, employes, and attorneys, and are shown by the books of account kept by the defendant, his employes and accountants, which are not accessible to plaintiff, and prays that defendant answer on these points specifically, and that said books may be produced.

Plaintiff further alleged that the account between him and defendant as to this matter was still open and unsettled. Plaintiff further al-

leged that the defendant refused to account with plaintiff, and as reasons therefor pretends that he had no notice that the said A. A. Burck assigned or transferred to plaintiff one-half interest in his, the said A. A. Burck's, one-sixteenth interest in the profits that might arise from the building of said capitol under said contract, and that the defendant in good faith and without notice, purchased from said A. A. Burck one sixteenth interest in said profits, after said A. A. Burck had sold one-half of his said interest to plaintiff, and therefore, defendant refuses to account with plaintiff; whereas the truth is that the said transfer by A. A. Burck to plaintiff was duly authenticated for registration in the office of the county clerk, and was duly recorded in the records of deeds of Travis county, Texas, on the 14th day of April, 1883, and said Abner Taylor then had notice of the same; whereas the said A. A. Burck did not sell or transfer any of his said interest in said profits to said Abner Taylor until the 27th day of May, 1884. That the said Abner Taylor ought not to be heard to aver that said registration was not notice to him of the said assignment, by A. A. Burck to plaintiff, for that the instrument by which the co-partnership between Mathias Schnell, Abner Taylor, Amos C. Babcock, Charles B. Farwell and John V. Farwell was formed, as hereinbefore alleged, and in which was contained an assignment, by Schnell, of a part interest and a stipulation that the profits arising from the building of the capitol should be divided between said parties, or the *assignees* of either party, was recorded by said partnership in the register of deeds of Travis county, Texas, whereupon the said A. A. Burck, J. M. Beardsley, and James S. Drake, acting on their means of giving notice of assignments adopted by said partnership, caused said assignment to be recorded in the office of the clerk of the county court of Travis county, in the records of deeds, and afterwards, when the said Schnell assigned his remaining interest in said contracts and in the profits that might arise in the fulfillment of the same, to the other members of the firm, styled Taylor, Babcock & Co., the said firm caused this assignment to be also recorded in the register of deeds of Travis county, as a means of giving notice thereof; that when the said firm of Taylor, Babcock & Co., and the individual members thereof, assigned their interests in said contract to defendant, Abner Taylor, they and said Taylor, in their contract of assignment, referred to the several mesne assignments of interest in said contracts as being of record in said clerk's office, to which record reference was made for the particulars of said contracts; that by these acts the parties concerned in said contract for building said capitol building agreed and established a custom among themselves to give notice of assignments of interest in said capitol contract, or in the profits thereof, by recording such assignments in the records of deeds of Travis county, Texas, and by their conduct in so recording such assignments and referring to said records and not otherwise giving notice of such assignments, led plaintiff to believe, and justified him in believing, that said partnership and its assigns would take notice of the assignment of A. A. Burck to plaintiff, when said assignment was recorded in the records of deeds of Travis county: that plaintiff, therefore, recorded the said assignment to him in the records of deeds of Travis county on the 14th day of

April, 1883, being more than a year before Abner Taylor purchased any interest from said A. A. Burck.

And plaintiff further says that said assignment by A. A. Burck to Abner Taylor did not purport on its face to sell or assign to said Taylor the interests in the profits of said capitol contract which the said A. A. Burck had assigned to this plaintiff, but only purported to assign to said Taylor whatever interest the said A. A. Burck had at the time of the said assignment to Abner Taylor, or might thereafter have, wherefore the said Abner Taylor was placed upon notice and inquiry as to whether said A. A. Burck had parted with any of his interest before the assignment of his remaining interest to Taylor, but that Taylor made no inquiry of said A. A. Burck as to whether he had parted with any of his, the said Burck's interest, nor did *the* said Taylor examine or cause to be examined the records of deeds of Travis county for any record of an assignment by said A. A. Burck, notwithstanding the said custom and practice of all parties concerned in assignments affecting said capitol contract or interests in the profits thereof to record all such assignments. A copy of the assignment by A. A. Burck to Abner Taylor was made a part of the bill and marked Exhibit "P" for identification. (Rec. p. 69.)

The plaintiff prays as follows:

1. That an account may be taken under the direction and decree of this honorable court of the expenses and losses necessarily or properly made by the said defendant in the construction of said capitol building and the time each item of expense was incurred, and that the defendant be credited with the same, and interest thereon, at the rate of six per cent. per annum from the time the same was expended until said capitol building was completed and accepted by the State of Texas.

2. That it be ascertained what quantity of land the said Abner Taylor received titles to from the State of Texas in payment in whole or in part for the building of said capitol building, and when the said Abner Taylor received titles to the different installments of said land, and whether he has conveyed the same or any part thereof to any person or persons so as to pass to such person or persons the title to said land, and when each of said conveyances was made, and the value of said land at the time of such conveyance or conveyances, and that interest at the rate of eight per cent. on the value of said land from the time the same was sold and conveyed be estimated and offset against the interest allowed said Abner Taylor on the money expended in the construction of said building, until said capitol building was completed and accepted by the State, and that the balance, which will amount to more than seven million dollars, be decreed to be profits, resulting to the said Taylor from the building of said capitol building under said contract with the State of Texas, and that the defendant may be decreed to pay plaintiff one thirty-second part of said profits and interest thereon at the rate of eight per cent. per annum from the time of the completion of said capitol building and its acceptance by the State of Texas, and that plaintiff may have general relief.

The defendant demurred to the bill generally, and stated the following grounds for demurrer:

1. Because plaintiff has an adequate remedy at law.

2. Because the bill states no grounds for relief or discovery.

3. Because the bill is one for discovery, and is not sworn to.

Defendant for grounds of special demurrer presented the following points:

1. That the ~~agreements~~ averments as to the meaning of Exhibit "L" are contradictory, repugnant, and not borne out by the face, substance, meaning and actual contents of said exhibit.

2. That the averments as to the contents, substance and meaning of Exhibit "E," made a part of the bill, are contradictory of, repugnant to and not borne out by the face, substance, meaning and actual contents thereof.

3. That the averments as to Exhibit "O," made a part of the bill, are contradictory of, repugnant to and not borne out by the face, substance, meaning and actual contents of said exhibit, in that it averred that said instrument was an assignment by A. A. Burck to plaintiff of an interest in the profits that might arise to the contractors from the building of the capitol, when it was really a conveyance of an interest in the capitol contract set out in Exhibit "J."

4. That the bill is defective in that it shows that the capitol contract was by its terms not assignable without the written consent of the State authorities, and in that the bill fails to aver that the transfer by Matthias Schnell to A. A. Burck and others, and the transfer from A. A. Burck to S. B. Burck, were made by consent of the State of Texas.

5. Because the bill fails to aver that defendant had notice of the sale by Schnell to A. A. Burck and others when the defendant, after having bought an interest from Schnell, afterwards bought the remaining interest from said Schnell.

6. That the bill is contradictory on its face with its Exhibit "P," in that it alleges that the conveyance from A. A. Burck to defendant only purported to assign whatever interest the said A. A. Burck had at the time of making said assignment, when in truth said assignment purported to convey to Taylor all the interest and claim said A. A. Burck then possessed or ever had in said contract.

7. That the allegation by plaintiff that defendant had notice of the transfer by A. A. Burck to plaintiff, stating in what the notice consisted, shows that in law defendant had no notice of said transfer.

8. Because plaintiff fails to offer to do equity by tendering to defendant the money which he paid A. A. Burck as a consideration for the transfer by A. A. Burck to defendant.

At the February term of court at Austin, on the 4th day of March, 1890, the court entered a decree sustaining the demurrer and dismissing the bill, the plaintiff having declined to amend, from which decree the plaintiff has appealed to this court, and assigns the following error:

ASSIGNMENT OF ERROR.

The court erred in sustaining the demurrer and dismissing the bill.

Reply to the points of the General Demurrer:

I.

The first ground of the demurrer,—that the plaintiff has an adequate remedy at law—is not well taken. The contract between Schnell and Taylor, Babcock and the Farwells constituted these parties partners, with equal shares in the profits in building the Texas capitol. The assignment by Schnell to A. A. Burck of one-sixteenth interest in the profits that might, in the future, accrue from constructing said building under said contract was operative only in equity and gave said A. A. Burck a right to an accounting on the completion of said building.

Matthewson vs. Clark, 6 How. 122.

Claggett vs. Kilbourne, 1 Black, 346.

The assignment by A. A. Burck of part of his interest to plaintiff conferred on plaintiff a right to a like remedy.

Taylor received the titles to the land patented by the State in payment for the building and held the same in trust to convert into money that the profits might be ascertained, and was a trustee, and plaintiff as *cestui que trust*, has a right to an accounting with him in equity.

Further, the bill shows that the accounting sought will involve among other things an investigation into the items of expenditure in building a building that cost three million dollars, which in the nature of things must be complicated so that there is no adequate remedy at law even if the right of the plaintiff was a legal one, therefore, the jurisdiction attaches in equity.

II.

Neither the second nor the third grounds of demurrer are tenable. The bill is not for discovery to aid a suit at law, but seeks equitable relief founded in part upon the partial discovery sought, and therefore it need not have been sworn to.

Story's Eq. Pl., Sec. 288.

Reply to the grounds of Special Demurrer:

I.—II.—III.

Counsel for appellant fail to understand the existence or materiality of the points of inconsistency and repugnance between the averments of the plaintiffs bill as to exhibits and the contents of the exhibits to the bill, which are suggested in the first, second and third grounds of the special demurrer, and as they have not been insisted upon or argued by appellees we will not undertake to discuss them.

IV.

The objection made in the fourth grounds of special demurrer that the bill is defective because it shows on its face that the contract for building the State capitol was not assignable, except by consent of the State authorities, which consent is not averred as to the assignment to A. A. Burck, and from him to appellant, S. B. Burck, is not well taken, as the inhibition against assignments contained in the contract was only intended for the protection of the government, and was not intended to interfere with the right of the contractor to make such

disposition of the profits which he might receive as he might choose to make, so long as the government had no settlement to make with assignees, and no authority to take part in the management of the work was assigned.

A similar question arose in this court in the case of Hobbs vs. McLean, 117 U. S., 567, wherein sec. 3477 and 3737 of the Revised Statutes, forbidding assignments of claim against the United States were construed with reference to an assignment by a government contractor of a part of the profits he might receive. This court said: "They were passed in order that the government might not be harrassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

V.

The fifth ground for special demurrer is not supported by the record, for it is averred that the partnership of Taylor, Babcock & Co. had notice of the transfer by Schnell to A. A. Babcock et al. (Paragraph 4 of bill, record, p. 34.)

VI AND VII.

The sixth and seventh grounds of special demurrer assume that notice to Taylor of plaintiff's interest prior to A. A. Burck's assignment to Taylor was essential to plaintiff's case, and that the bill in alleging the facts to show that Taylor had notice of the assignment of A. A. Burck to the plaintiff, S. B. Burck, does not state facts which charge Taylor with notice of said assignment at the time A. A. Burck made the assignment to Taylor, and that therefore Taylor took the better title. As Taylor was himself an assignee under Schnell through Taylor, Babcock & Co., and acquired the interest of the partnership of Taylor, Babcock & Co. subsequent to the assignment by Schnell to A. A. Burck, under whom the plaintiff claims, it would seem that until the plaintiff was notified that Abner Taylor had acquired the interest of Taylor, Babcock & Co., as well as Schnell's remaining interest, the plaintiff would not be required to give notice to others than the firm of Taylor, Babcock & Co., who were referred to as interested parties in Schnell's contract with A. A. Burck.

These grounds of the special demurrer are untenable for other reasons. The bill after stating the plaintiff's case alleged:

That Taylor refuses to account to plaintiff, *upon the pretence* that he had *no notice* of A. A. Burck's said transfer to plaintiff, and *having no notice*, had in *good faith* and *for value*, purchased said A. A. Burck's one-sixteenth interest, after the latter's said transfer to plaintiff.

That, in truth and fact, that the said transfer to plaintiff was duly recorded in Travis county deed records on April 14, 1883, and Taylor then had notice thereof, and did not himself acquire any interest from A. A. Burck until May 27, 1884.

That Taylor should not be heard to deny notice of A. A. Burck's

transfer to plaintiff, because the agreement, practice and custom of all the parties to the capitol construction contract, and transfers of any interest therein, was to give notice thereof by record in said Travis county deed records and not otherwise, and plaintiff was thereby justified in believing, as he did believe, that said partnership and its assigns would take the said record of transfer by A. A. Burck to plaintiff as notice thereof. (R. 32-40.)

The bill then proceeds:

And your orator further says that said assignment by A. A. Burck to Abner Taylor did not purport on its face to sell or assign to said Taylor the interests in the profits of said capitol contract which the said A. A. Burak had assigned to your orator, but only purported to assign to said Taylor whatever interest the said A. A. Burck had at the time of the said assignment to Abner Taylor, or might thereafter have; *wherefor the said Abner Taylor, defendant, was placed upon notice and inquiry as to whether A. A. Burck had parted with any of his interest before the assignment of his remaining interest to the said Abner Taylor, but the said Abner Taylor made no inquiry of said A. A. Burck as to whether he had parted with any of his, the said Burck's, interest,* nor did the said Taylor examine or cause to be examined the records of deeds of Travis county for any record of an assignment by said A. A. Burck, notwithstanding the said custom and practice of all the parties concerned in assignments affecting said capitol contract or interest in the profits thereof to record all such assignments and the agreement thereby affected to that (as their?) method of giving notice of assignments. A copy of said assignment or release by said A. A. Burck to said Abner Taylor is herewith filed and made a part of this bill and marked "Exhibit P" for identification. Exhibit P, referred to in the bill and made part thereof—being the transfer by A. A. Burck to Taylor, of May 27, 1884. (Trans. 69), is thus:

AUSTIN, TEXAS, May 27, 1884.

For and in consideration of one dollar, in hand paid, and other valuable considerations, I hereby sell, assign, and transfer to Abner Taylor, of the county of Cook, State of Illinois, and A. C. Babcock, of the county of Fulton, said State, *all my rights, interest and claim, in and to* the contract or contracts from the State of Texas to build or erect a state-house or capitol building in the city of Austin and last-mentioned State, derived from a contract or agreement made with Matthias Schnell in Chicago, Cook county, Illinois, bearing date January 31st, 1882, *or any interest I may have* for building or erecting a state-house or capitol building in the city of Austin, Texas, derived from said Schnell at any time or from any other source, *hereby relinquishing* to said Taylor and Babcock *all right and claim* of any character to any and all contracts or agreements that I may have heretofore had or now possess pertaining to building, erecting, or constructing a state-house or capitol building in the City of Austin, State of Texas.

Witness my hand and seal this 27th day of May A. D. 1884.

[Seal.] A. A. BURCK.

Exhibit O, referred to in the bill and made part thereof, being the transfer by A. A. Burck to plaintiff, of April 14, 1883, (Trans. 65,) is thus :—

THE STATE OF TEXAS,
COUNTY OF TRAVIS.

Know all men by these presents that I, A. A. Burck, of the county of Milam and State of Texas, *in consideration of the sum of ten thousand dollars to me in hand paid by S. B. Burck*, of the county of Galveston and State of Texas, *the receipt of which is hereby acknowledged*, have granted, bargained, sold, conveyed, and released, and by these presents do grant, bargain, sell, convey, and release, unto the said S. B. Burck, heirs and assigns, the following described property, to-wit :—*One undivided one-half interest in one-sixteenth interest* in the capitol contract which was awarded to M. Schnell by the Texas State capitol commissioners, Joseph Lee and N. L. Norton, and transferred to me by said Schnell, together with all and singular the rights, members, improvements, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining.

To have and to hold all and singular the premises above mentioned unto the said S. B. Burck, heirs and assigns forever ; and I do hereby bind myself, heirs, executors, and administrators, to *warrant and forever defend* all and singular the said premises unto the said S. B. Burck, heirs and assigns, forever ; and I do hereby bind myself, heirs and assigns, *against every person whomsoever lawfully* claiming or to claim the same or any part thereof.

Witness my hand, at Austin, this 14th day of April, A. D., 1883.

A. A. BURCK. [Seal.]

To these exceptions we oppose this

PROPOSITION :

The bill and exhibits show, that the instrument under which Taylor asserts title is a *quit-claim*, and that he took thereunder—not as a *bona-fide* purchaser, but — subject to the prior assignment Burck to Taylor purported to, and did, convey to the latter then present, subsisting interest of the former in the capitol tion contracts.

2 Pomeroy's Eq. Jur. §§ 745, 752-3, 626-8, 591, 688-9, 695 ; Bishop v. Holcomb, 10 Conn., 446 ; 2 Warville on Vendors, § 13, p. 615 ; 1 id., § 5, pp. 337-8; 1 Devlin on Deeds, §§ 671, 16, 674.

Federal Decisions—Oliver v. Piatt, 3 How., 409-10; Van Renseelaer v. Kearney, 11 How., 322-3; May v. LeClaire, 11 Wall., 232; Dickerson v. Colgrove, 100 U. S., 584; Baker v. Humphrey, 101 U. S., 499; Villa v. Rodriguez, 12 Wall., 338-9 ; Brown v. Jackson, 3 Wheat., 452-3 ; Runyan v. Smith, 18 Fed. Rep., 580-2; United States v. Sliney, 21 Fed. Rep., 895 ; Hastings v. Nissen, 31 Fed. Rep., 600 ; McClung v. Steen, 32 Fed. Rep., 374; Gest v. Packwood, 34 Fed. Rep., 372, citing 2 Pom. Eq. Juris., § 753.

Texas Decisions—Shepard v. Hunsacker, Posey's Unreported Cases, Commission of Appeals, 579, 583-6 ; Rogers v. Burchard, 34 Tex.,

transfer to plaintiff, because the agreement, practice and custom of all the parties to the capitol construction contract, and transfers of any interest therein, was to give notice thereof by record in said Travis county deed records and not otherwise, and plaintiff was thereby justified in believing, as he did believe, that said partnership and its assigns would take the said record of transfer by A. A. Burck to plaintiff as notice thereof. (R. 32-40.)

The bill then proceeds:

And your orator further says that said assignment by A. A. Burck to Abner Taylor did not purport on its face to sell or assign to said Taylor the interests in the profits of said capitol contract which the said A. A. Burak had assigned to your orator, but only purported to assign to said Taylor whatever interest the said A. A. Burck had at the time of the said assignment to Abner Taylor, or might thereafter have; *wherefor the said Abner Taylor, defendant, was placed upon notice and inquiry as to whether A. A. Burck had parted with any of his interest before the assignment of his remaining interest to the said Abner Taylor, but the said Abner Taylor made no inquiry of said A. A. Burck as to whether he had parted with any of his, the said Burck's, interest,* nor did the said Taylor examine or cause to be examined the records of deeds of Travis county for any record of an assignment by said A. A. Burck, notwithstanding the said custom and practice of all the parties concerned in assignments affecting said capitol contract or interest in the profits thereof to record all such assignments and the agreement thereby affected to that (as their?) method of giving notice of assignments. A copy of said assignment or release by said A. A. Burck to said Abner Taylor is herewith filed and made a part of this bill and marked "Exhibit P" for identification. Exhibit P, referred to in the bill and made part thereof—being the transfer by A. A. Burck to Taylor, of May 27, 1884. (Trans. 69), is thus:

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Witness my hand and seal this 27th day of May A. D. 1884.

A. A. BURCK.

[Seal.]

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To have and to hold all and singular the premises above mentioned unto the said S. B. Burck, heirs and assigns forever ; and I do hereby bind myself, heirs, executors, and administrators, to *warrant and forever defend* all and singular the said premises unto the said S. B. Burck, heirs and assigns, forever ; and I do hereby bind myself, heirs and assigns, *against every person whomsoever lawfully* claiming or to claim the same or any part thereof.

Witness my hand, at Austin, this 14th day of April, A. D., 1883.

A. A. BURCK. [Seal.]

To these exceptions we oppose this

PROPOSITION :

The bill and exhibits show, that the instrument under which Taylor asserts title is a *quit-claim*, and that he took thereunder—not as a *bona-fide* purchaser, but—subject to the prior assignment of A. A. Burck to Taylor, purported to, and did, convey to the latter only the then present, subsisting interest of the former in the capitol construction contracts.

2 Pomeroy's Eq. Jur. §§ 745, 752-3, 626-8, 591, 688-9, 695 ; Bishop v. Holcomb, 10 Conn., 446 ; 2 Warville on Vendors, § 13, p. 615 ; 1 id., § 5, pp. 337-8; 1 Devlin on Deeds, §§ 671, 16, 674.

Federal Decisions—Oliver v. Piatt, 3 How., 409-10; Van Renseelaer v. Kearney, 11 How., 322-3; May v. LeClaire, 11 Wall., 232; Dickerson v. Colgrove, 100 U. S., 584; Baker v. Humphrey, 101 U. S., 499; Villa v. Rodriguez, 12 Wall., 338-9 ; Brown v. Jackson, 3 Wheat., 452-3 ; Runyan v. Smith, 18 Fed. Rep., 580-2; United States v. Sliney, 21 Fed. Rep., 895 ; Hastings v. Nissen, 31 Fed. Rep., 600 ; McClung v. Steen, 32 Fed. Rep., 374; Gest v. Packwood, 34 Fed. Rep., 372, citing 2 Pom. Eq. Juris., § 753.

Texas Decisions—Shepard v. Hunsacker, Posey's Unreported Cases, Commission of Appeals, 579, 583-6 ; Rogers v. Burchard, 34 Tex.,

452-2; Hamman v. Keigwin, 39 Id., 42; Carter v. Wise, Id. 275; Harrison v. Boring, 44 Id., 260-4; Milam Company v. Bateman, 54 Id., 169; Lumber Company v. Hancock, 70 Id., 313-4; Garrett v. Christopher, 74 Id., 454; Richardson v. Levi, 67 Id., 361-7; Watkins v. Edwards, 23 Id., 447.

The rule that circumstances occurring in a transaction which should put a party thereto on inquiry, charge him with notice of all facts which he might have learned if proper inquiry had been made, applies to notices of assignments of choses in action.

Anderson v. Van Alen, 12 Johnson's Rep., 343; Hockett v. Marlin, 8 Me., 77.

If the transfer by A. A. Burck to Taylor and Babcock, of May 27, 1884, was a quit claim, they were not *bona fide* purchasers, and took subject to the prior transfer by said Burck to plaintiff, and only such interest as he had on said date. That the transfer to Taylor and Babcock was, in legal effect, a quit claim, and that it did not purport to convey any interest not owned by Burck at the date of its execution, seems to us to result from the language of the instrument itself.

For an unspecified, and, as expressed, mere nominal consideration, Burck, without warranty of any kind, sells, assigns and transfers to Taylor and Babcock all his right, interest and claim in and to the contract or contracts with the State to erect a capitol building, derived from a contract with Schnell of January 21, 1882; or any interest he might have ("I may have"; in the present tense) for erecting such building, derived from said Schnell at any time, or from any other source; and follows this by relinquishing to Taylor and Babcock "all right or claim of any character to any and all contracts or agreements that I may have heretofore had or now possess, pertaining to building, erecting or constructing a State house or capitol building in the city of Austin, State of Texas."

While the words "sells, assigns and transfers" are not those that distinctively mark the quitclaim, yet taken in connection with the word "relinquish," occurring in a subsequent part of the instrument and obviously applying to the same interest to which the latter term applies, and the whole construed in the light of the significant omission of either specific description, consideration or warranty, the terms aptly characterize and constitute a mere quitclaim of an undefined, present interest.

The instrument appears to be no more than a release by Burck to Taylor and Babcock of his then subsisting interest in a property or estate whereof they were already owners of a larger part.

The words "heretofore had," used in connection with the terms of relinquishment, do not refer to the right or claim intended to be conveyed, but to the contracts and agreements out of which such right or claim, *as a present interest*, had issued.

The meaning is, that the seller conveys, by release or relinquishment, all subsisting right or claim of any character held by him, derived from contracts or agreements pertaining to the erection of the capitol building to which he then was, or had theretofore been, a party in interest.

If, however, the instrument be not a quitclaim, but a conveyance by

bargain and sale, it would still be ineffective to place Taylor and Babcock in the position of *bona fide* purchasers without notice of Burck's prior conveyance to plaintiff, because the interests passed by the two instruments were not the same.

The bill expressly alleged that the prior sale to plaintiff was of a *specified* interest; that is, of an undivided one-half interest in the undivided one-sixteenth interest of A. A. Burck, being an interest of one-thirty-second part.

The sale to Taylor and Babcock was not of a particular designated interest, but of all the interest owned by Burck.

He appears to have held, at that time, an interest of a one-thirty-second part; so that there was an interest upon which the last conveyance could and did operate, without in any manner compromising or affecting the specified interest sold to plaintiff.

Had the purpose of Burck been to convey, or assume to convey, a second time the specified interest theretofore vested in plaintiff, as well as the interest he still retained, it must be supposed that he would have designated the interest conveyed to Taylor and Babcock as an undivided one-sixteenth part.

Whether the conveyance to Taylor and Babcock be by quitclaim or by bargain and sale, the construction we have given it is the only one that harmonizes all its parts.

The construction that makes the words "I have heretofore had," coupled with the terms of relinquishment, indicate an assumption by Burck of title to a different and greater interest than that already by the same interest conveyed, asserts that the instrument conflicts with itself.

Beyond contention, the terms of the instrument preceding the relinquishment clause convey but an unspecified present right, interest or estate; and without inconsistency, the subsequent terms can be construed to apply to precisely the same interest.

The opposite construction necessarily involves one of two equally inadmissible assumptions:

1. That Burck did not know what he owned and had the right to convey; or,

2. That knowing that he only retained and had the right to convey such interest as remained in him after his sale to plaintiff of a specific one-thirty-second part, he designedly undertook to defraud plaintiff by assuming to convey the latter's interest as well as the interest that remained in himself.

The fact that Taylor as a party to the contract by which Schnell transfered three-fourths interest in the building contract to Taylor, Babcock & Co., agreed to the stipulation in said contract for a division of the profits between the parties "or their heirs or assigns" charged him particularly to make inquiry for assignments, and emphasized the significance of the terms of the assignment tendered to Taylor by A. A. Burck by which Burck proposed to assign only his present interest or that which might thereafter accrue to him. The failure to make inquiry under such circumstances was negligence which prevented him from becoming a *bona fide* purchaser.

Anderson v. Van Alen, 12 John 342.

Hockett v. Martin, 8 Me. 77.

Many authorities in this country abide by the doctrines that, in cases such as the present record presents, he who is first in time is first in right.

2 Pom. Eq. Jur., § 695, p. 146; Thayer v. Daniels, 113 Mass., 131; Bush v. Lathrop, 22 N. Y., 535, 546-9; Canover v. Van Meater, 18 N. J., Eq., 484.

But whatever the true rule may be, it would seem to be indisputable, that, to say the least, the purchaser of a chose in action whose title can be adjudged superior to that of a prior assignee—by reason of the latter's failure to notify the debtor or trustee before the former's purchase and notification—*must be a bona fide* purchaser.

2 Pom. Eq. Jur., §§ 695, p. 146; 691, p. 141; 698; 713; 715, p. 171; 750; 753; 755.

Spain v. Hamilton, 1 Wall., 623; Judson v. Corcoran, 17 How., 614-5; Ward v. Morrison, 25 Vt., 600-1; Loomis v. Loomis, 26 Vt., 203-4; Cladfelter v. Cox, 33 Tenn. (1 Sneed), top p. 339-341; Judah v. Judd, 5 Day, 535; Bishop v. Holcomb, 17 Conn., 446-7; Hartford Ins. Co., v. Vam Buskirk, 14 Conn., 144.

VIII.

The eighth and last ground of special demurrer is not tenable. It does not appear from the bill that plaintiff received any of the money paid by Taylor to A. A. Burck, or any benefit therefrom, or that he knew anything about it. Therefore, he is not bound in equity to indemnify Taylor in order to enforce his own right.

The decree should be reversed.

F. G. MORRIS,
F. CHAS. HUME.
Counsel for Appellant.

FILED.
DEC 12 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 170.

S. B. BURCK, *Appellant*,

vs.

ABNER TAYLOR.

BRIEF FOR APPELLEE.

GEORGE E. HAMILTON,
For Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 170.

S. B. BURCK, *Appellant*,

vs.

ABNER TAYLOR.

BRIEF FOR APPELLEE.

I.

STATEMENT.

The appellant in this suit seeks to establish under a deed or assignment, an interest in the profits arising out of a contract between the State of Texas, and one Matthias Schnell, the assignee of the defendant Taylor, for the erection and construction of a new Capitol building for the State of Texas.

This suit was originally brought in the District Court of Travis County, Texas, at the March Term of 1889, when, under article 2738, Revised Statutes of the State of Texas, the deposition of the defendant Taylor was taken at the instance of counsel for the plaintiff (Record p. 9), and the deposition of the plaintiff Burck was taken at the instance of counsel for the

defendant (Record p. 19). At the same term, on the petition of the defendant, the cause was removed to the United States Circuit Court for the Western District of Texas, on the ground that the suit was between citizens of different States, and docketed on the law side of the court. At a later date the cause was, on motion of the plaintiff, transferred to the equity side of the court and the plaintiff given leave to file his amended bill, which he accordingly did on October 7, 1889.

The amended bill sets out—

First. The contract between the State of Texas, party of the first part, and one Matthias Schnell, a citizen of Illinois, of the second part, for the building of the new Capitol of the State of Texas.

Under this contract, entered into January 18, 1882, the said Schnell was to build the new Capitol according to the plans and specifications and conditions agreed upon by the parties, and was to receive from the party of the first part, for the performance of this work, three million acres of the public land of the State of Texas, situated in the counties of Dallas, Hartley, Oldham, Deaf Smith, Palmer, Castro, Bailey, Lamb, and Hockley. Title to said land to be made to said Schnell in installments as the work progressed. (Record pp. 41–52.)

The 26th section of this contract, which has an important bearing upon this controversy, reads as follows:

"It is further agreed, covenanted and stipulated by the party of the second part, that this contract shall not be assigned, in whole or in part, by the party of the second part, without the consent in writing of the party of the first part, signed by the Governor of Texas and the Capitol Building Commissioners, with the advice and consent of the heads of the departments."

Second. An agreement or contract, dated January 31, 1882, between the said Schnell, of the one part, and Charles B. Farwell, John V. Farwell, Abner Taylor and Amos C. Babcock, whereby the said Schnell did assign, transfer and set over to the other parties named an undivided ⅘ interest in said contract, for the purpose that the said parties might share in any and all of the profits that might arise from said contract the same as said Schnell, as their interests might appear, and it was agreed that their interests were to be equal.

It was further stipulated that said Charles B. and John V. Farwell, Abner Taylor and Amos C. Babcock should furnish the necessary money for the construction of the Capitol building. The management and superintendence of said building, from its commencement to its completion, was placed under said Schnell, subject to the direction and control of a majority interest in said contract—the said Schnell to receive as a salary the sum of $5,000 per annum.

It was further agreed that the sum of $13,000 due said Schnell should be paid out of money to be realized from the sale of the lands, and that when said sum had been paid, all moneys advanced by the Farwells, Taylor and Babcock should be repaid, with interest from the date of advancement, and when these advances had been fully paid, that then all other profits should be divided between the parties according to their interests in and under the contract.

This contract was assented to by the State of Texas in accordance with the requirement of the contract between said State and said Schnell. (Record pp. 53–54.)

Third. An agreement between Matthias Schnell, James M. Beardsley, James S. Drake and A. A. Burck,

dated January 31, 1882, whereby the said Schnell, in consideration of the services of the other parties named, in the procurement of the contract with the State of Texas, and of one dollar to him paid, did set over and transfer and assign to each of the parties named an undivided ¼ part of an undivided ¼ share and interest owned by the said party of the first part, in and under the State Capitol contract, excepting the salary to be received by said Schnell, and the $13,000.00 to be repaid him. (Record pp. 55–56.)

The bill alleges that this contract was entered into by the parties thereto, with the knowledge and assent of the Farwells, Taylor and Babcock. It was not approved by the State of Texas, but was recorded in the office of the clerk of Travis County. (Record p. 57.)

Fourth. A contract dated May 9, 1882, between said Schnell and the said Farwells, Taylor and Babcock whereby the said Schnell transferred, released and conveyed to the other parties all the rights and interests which he had under the State Capitol contract, the consideration being the sum of $15,500, and in this contract he also transferred, assigned and released to the same parties, all rights and interests and claims which he might have, or thereafter assert, by virtue of any contract made by him with the said parties regarding the construction of the said Capitol, or the superintendency thereof, and all interest accruing to him from any contract regarding said building. (Record pp. 57–58.)

This contract was approved in due form by the State of Texas. (Record p. 59.)

Fifth. An agreement dated the 20th day of June, 1882, between the firm of Taylor, Babcock and Company and Abner Taylor, whereby the contract to build

the State Capitol was transferred and assigned to said Taylor. (Record p. 60.)

This contract was duly approved by the State of Texas. (Record p. 64.)

Sixth. A warranty deed, dated April 4, 1883, from A. A. Burck to S. B. Burck, whereby the said A. A. Burck sold, transferred and assigned to the said S. B. Burck, plaintiff in this cause, one undivided $\frac{1}{2}$ interest in the undivided $\frac{1}{16}$ interest of said A. A. Burck in the profits that might arise under the contract for the building of the Capitol. *This deed was recorded in the office of the Clerk of Travis County, Texas.*

While the consideration named in this agreement is $10,000, it appears from the deposition of S. B. Burck (Record p. 20) that $1,000 was, in reality, the money consideration.

Seventh. An agreement or deed from A. A. Burck to Abner Taylor, dated May 27, 1884, whereby the said A. A. Burck sold, assigned and transferred to the said Taylor all of his rights, interests and claim in and to the contract or contracts from the State of Texas to build or erect a State House or Capitol Building, in the city of Austin, derived from a contract or agreement made with Matthias Schnell, bearing date January 1, 1882, or any interest he might have for building or erecting said State House, derived from said Schnell at any time or from any other source. (Record p. 69.)

Eighth. A conveyance of all lands received under said Capitol contract from the State of Texas, by Abner Taylor to the Earl of Aberdeen and others in England. (Record p. 38.)

The bill alleges that the value of the land referred to, at the time of its conveyance by Abner Taylor, was

more than $4 per acre, and the plaintiff, asserting a right to a $\frac{1}{32}$ part of the profits arising out of the State capitol contract, acquired under and by virtue of the deed from A. A. Burck, prays for an accounting; for an ascertainment of the quantity of land received by Taylor from the State of Texas under said contract, and whether said defendant has conveyed the same or any part thereof to other persons; when such conveyances were made, and the value of the land at the time, and for an order directing the defendant Taylor to pay to the plaintiff a $\frac{1}{32}$ part of the profits, with interest from the completion of the Capitol Building and its acceptance by the State of Texas.

To this amended bill the defendant demurred generally, and stated the following grounds:

1st. Because plaintiff has an adequate remedy at law.

2d. Because the bill states no grounds for relief or discovery.

3d. Because the bill is one for discovery, and is not sworn to.

Defendant for grounds of special demurrer presented the following points:

1st. That the averments as to the meaning of Exhibit "L" are contradictory, repugnant, and not borne out by the face, substance, meaning and actual contents of said exhibit.

2d. That the averments as to the contents, substance and meaning of Exhibit "E", made a part of the bill, are contradictory of, repugnant to and not borne out by the face, substance, meaning and actual contents thereof.

3d. That the averments as to Exhibit "O", made a part of the bill, are contradictory of, repugnant to and not borne out by the face, substance, meaning and

actual contents of said exhibit, in that it averred that said instrument was an assignment by A. A. Burck to plaintiff of an interest in the profits that might arise to the contractors from the building of the capitol, when it was really a conveyance of an interest in the capitol contract set out in Exhibit "J."

4th. That the bill is defective in that it shows that the capitol contract was, by its terms, not assignable without the written consent of the State authorities, and in that the bill fails to aver that the transfer by Matthias Schnell to A. A. Burck and others, and the transfer from A. A. Burck to S. B. Burck were made by consent of the State of Texas.

5th. Because the bill fails to aver that defendant had notice of the sale by Schnell to A. A. Burck and others when the defendant, after having bought an interest from Schnell, afterwards bought the remaining interest from said Schnell.

6th. That the bill is contradictory on its face with its Exhibit "P", in that it alleges that the conveyance from A. A. Burck to defendant only purported to assign whatever interest the said A. A. Burck had at the time of making said assignment, when in truth said assignment purported to convey to Taylor all the interest and claim said A. A. Burck then possessed or ever had in said contract.

7th. That the allegation by plaintiff that defendant had notice of the transfer by A. A. Burck to plaintiff, stating in what the notice consisted, shows that in law defendant had no notice of said transfer.

8th. Because plaintiff fails to offer to do equity by tendering the money which he paid A. A. Burck as a consideration for the transfer by A. A. Burck to defendant.

The cause was heard at the February Term of the

court, 1890, and the demurrer being sustained the bill was dismissed, and an appeal taken by the plaintiff to this Court.

II.

BRIEF OF ARGUMENT.

The only assignment of error set out on behalf of the appellant is that the court erred in sustaining the demurrer and dismissing the bill.

The demurrer is based upon several grounds, some of a general nature and others directed to particular defects in, and parts of, the bill of complaint.

I would direct the Court's attention to the fourth and seventh grounds of special, and the second ground of general demurrer, which will be discussed in the order named.

1.

The fourth ground of demurrer is "That the bill is defective in that it shows that the capitol contract was by its terms not assignable without the written consent of the State authorities, and in that the bill fails to aver that the transfer by Matthias Schnell to A. A. Burck and others, and the transfer from A. A. Burck to S. B. Burck, were made by consent of the State of Texas."

The plaintiff alleges, and sues to recover, an interest in the profits of the new capitol contract, and traces his title back to Schnell through and under mesne conveyances or assignments. His interest, therefore, depends upon the validity of two papers—the agreement between Schnell and J. M. Beardsley, James S. Drake and A. A. Burck (Record p. 55), and the deed from A. A. Burck to S. B. Burck (Record p. 65).

Both the agreement and deed were made in direct violation of the 26th section of the new capitol

contract, which provides that "it is further agreed, covenanted and stipulated by the party of the second part, that this contract shall not be assigned, in whole or in part, by the party of the second part without the consent in writing of the party of the first part, signed by the Governor of Texas and the Capitol Building Commissioners, with the advice and consent of the heads of departments."

It is argued in the brief of counsel for appellant, that this provision was only intended for the protection of the State, and must be controlled by the decisions of this Court in passing upon the meaning and effect of Sec. 3737, Rev. Stat. U. S., and Hobbs *vs.* McLean, 117 U. S., 567, is particularly relied on. It is submitted that this contention cannot be sustained.

The decisions of this Court referred to have relation to a statute passed by Congress, evidently for the protection of the Government, as in Hobbs *vs.* McLean explained. But here we have the provision of a contract, every requirement of which has equal relation to both parties.

The interpretation of a statute cannot be applied to the provisions of a contract which depends and is provided on the idea of complete mutuality.

In a contract, such as the one in question, the provision referred to was at once reasonable and beneficial to all of the parties.

The consideration for the building of the new Capitol was land to be conveyed from time to time to the parties of the second part. All profits were contingent upon the sale of this land, and could not be measured by the parties in interest until the land was sold. It was, therefore, most important that no assignment of any interest should be made without the knowledge of all, and the approval of the State being a public act,

was the best notice. It will be remembered that into this contract, made January 18, 1882, the defendant Taylor and others were admitted, January 31, 1882, and by their admission with the assent of the State of Texas, they were, and the defendant Taylor now is, entitled to the benefit of every provision of the original contract, and especially to the protection afforded by such certain notice of any assignment. Each stood to the other in the relation of a trustee. It was all important to each that the contract should be fulfilled in its entirety, and its fulfillment could only be accomplished by the certain knowledge on the part of each as to all of the parties in interest under the contract, and the extent of each interest.

It is somewhat singular that while the contract between Schnell and Taylor, Farwell, *et al.* and the assignment by Schnell to Burck, Beardsley and Drake, are both of January 31, 1882, the former is approved by the State of Texas, the latter is not.

2.

The seventh ground of demurrer states—

"That the allegation by plaintiff that defendant had notice of the transfer by A. A. Burck to plaintiff, stating in what the notice consisted, shows that in law defendant had no notice of said transfer."

It will be remembered that the interest claimed by the complainant S. B. Burck in the State Capitol contract, as derived from Schnell. through a deed from A. A. Burck, is asserted against the defendant Taylor, who is a subsequent purchaser of all the interest of A. A. Burck in possession and without notice of said deed from A. A. Burck to S. B. Burck, and such is the position of the defendant according to the allegations of the Bill of Complaint.

While the bill, in paragraph four, alleges that the assignment from Schnell to A. A. Burck *et al.* was made with the knowledge and consent of Taylor, Babcock and Co., it does not allege that the conveyance from A. A. Burck to the complainant was with such knowledge and consent. It alleges the record of said deed among the records of Travis County as notice.

It is submitted that the record of the deed was no notice to the defendant Taylor, or to any subsequent purchaser from A. A. Burck, even if it could have been legally made without the assent in writing of the State of Texas, and this is so whether the deed is held to be an instrument required or permitted by law to be recorded or not. If it is a recordable instrument, it is so because it "concerns lands," and if such is its character it should have been recorded, not in Travis County, but in some of the counties where the land, involved in the State Capitol contract, is situated.

Rev. Stat. Tex., Art. 4333.

If it is held to be an instrument not required or permitted by law to be recorded, then, wherever recorded, it does not operate as notice.

Burham *vs.* Chandler, 15 Tex., 441; Wright *vs.* Lancaster, 48 Tex., 250.

Upon the question as to what instruments of writing are required or permitted by law to be recorded, see Rev. Stat. Tex., Art. 4331.

It is contended in the brief for appellant (p. 10) that by a comparison of the two instruments from A. A. Burck, the one to complainant S. B. Burck, and the other to the defendant Taylor, it appears that the same interest is not conveyed, and, therefore, the defendant was placed upon "enquiry as to whether A. A. Burck had parted with any of his interest before said assignment to Taylor." It is submitted that an

examination of the assignment from A. A. Burck to Taylor, so far from stating or intimating that any part of his interest was, or might have been, before the making of that assignment, conveyed, passed or assigned, does, and was, intended to carry *all* of the interest obtained by A. A. Burck from Schnell. Nothing is therein stated to put the defendant upon enquiry. And in this connection and upon the point of constructive *notice*, I ask the attention of the Court to paragraph 12 of the Bill of Complaint, wherein the complainant urges "that the said Abner Taylor ought not to be heard to aver said *Registration* (in Travis County) was not notice to him of said assignment by A. A. Burck to your orator," the reason given being that the first contract between Schnell and Taylor and others, and the subsequent agreements, were recorded in Travis County. From this paragraph it would appear that the complainant knowing that the record of his deed in Travis County was not legal or actual notice, purposely and with the intention to obtain an advantage, had said deed recorded there in the hope of creating a case of constructive notice.

And this view is strengthened by the fact (Record pp. 66-67-68) that after the assignment from A. A. Burck to the defendant Taylor the complainant caused his deed to be recorded in the counties wherein the land in question is situated.

Again, as between the parties to the State capitol contract, it was both convenient and proper that these agreements, which indeed need not have been recorded at all, should, for convenience, have been recorded in Travis County, where the contract was to be completed. But this rule of convenience would not apply to third persons. The conduct of the parties to the contract in this particular cannot be relied on by the complainant

as affording either an excuse to him for failing in a legal requirement, or for a ground of constructive notice.

From the allegations of the bill, the defendant is placed in the position of a *bona fide* purchaser for a valuable consideration, without notice of prior adverse rights from any source, and under the application of the settled principles of Equity Jurisprudence should not be disturbed in his rights and possession. The deed from A. A. Burck to complainant may be good and enforceable between themselves, but as to the defendant Taylor it is void and of no effect.

Without making any further reference to the other grounds of demurrer than is contained in the discussion of the main questions with which they are more or less connected, it is submitted that for the reasons contained in the fourth and seventh grounds of demurrer, the bill states no ground for relief, and the decree of the court below sustaining the defendants, demurrer should be affirmed.

Respectfully submitted.

GEORGE E. HAMILTON,
For Appellee.